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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909 1910.

No. [redacted] 46.

JULIAN HERENCIA, PLAINTIFF IN ERROR,

vs.

FELIX GUZMAN.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR PORTO RICO.

FILED AUGUST 4, 1909.

(21,286.)

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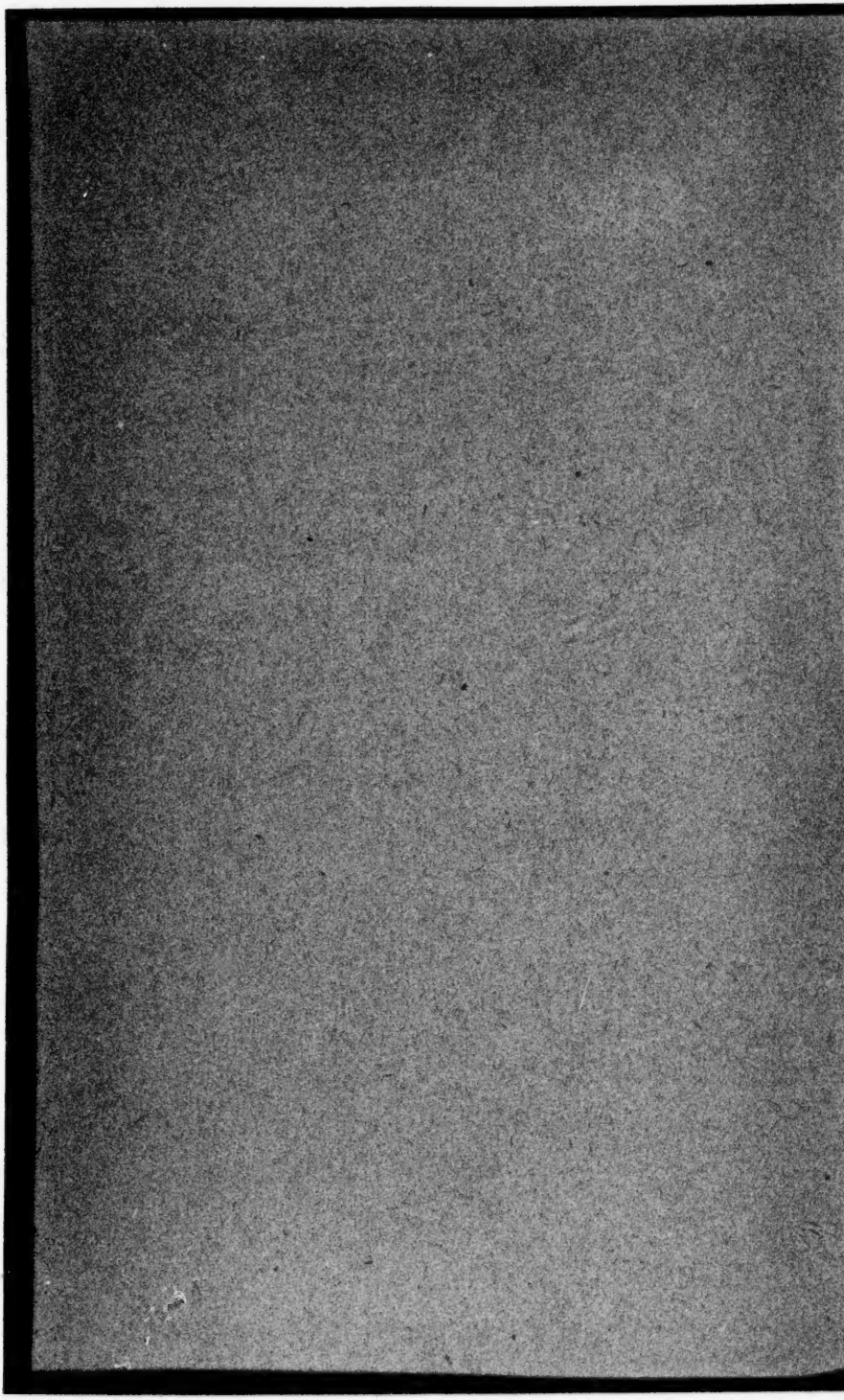

(21,286.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1908.

No. 490.

JULIAN HERENCIA, PLAINTIFF IN ERROR,

vs.

FELIX GUZMAN.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR PORTO RICO.

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1 THE UNITED STATES OF AMERICA,
District of Porto Rico, ss:

At a Special Term of the District Court of the United States for Porto Rico within and for the District aforesaid begun and held at the court-rooms of said Court in the City of Mayaguez on the fourth Monday of January, being the twenty-seventh day of that Month, in the year of our Lord one thousand nine hundred and eight and of the Independence of the United States of America the one hundred and thirty-second—present, the Honorable Bernard S. Rodey, Judge—among the proceedings had was the rendition of a judgment in the following cause, to wit:

FELIX GUZMAN
vs.
JULIAN HERENCIA.

Be it remembered that heretofore, to wit, on the 21st day of November, A. D. 1907, came the plaintiff by his attorneys and filed his complaint in this cause which said complaint is as follows, to wit:

No. —.

FELIX GUZMAN, Plaintiff,
vs.
JULIÁN HERENCIA, Defendant.

Felix Guzman, a citizen of Porto Rico, residing at Mayaguez, Porto Rico, brings this his complaint against Julián Herencia, a subject of the King of Spain, residing at Mayaguez, Porto Rico, in the aforesaid District, and alleges:

2 I.

That the defendant for a long time prior to, and at the time hereinafter set forth, owned a certain building or dwelling in the City of Mayaguez, Porto Rico, situated on McKinley Street, in said City, marked No. 36, and bounded on the North by McKinley Street, on the South by lot and house, the property of Guillermo Mulet, on the East by a lot and house the property of Rita Nadal, and on the West by Dr. Basora Street.

II.

That the eaves, or the part of said building projecting over the side walk that runs parallel to and close by the said premises on the McKinley Street side thereof, were for some time prior, and up to the date hereinafter set forth, negligently allowed by the said defendant to be and remain in a dangerous condition, without any sign or signal to indicate such danger.

III.

That on the night of the fourth day of November, 1907, the plaintiff was lawfully walking over the side walk that runs parallel to and close by the said premises of defendant, as aforesaid, being wholly unaware of any danger from said eaves or projecting part of said dwelling, and without any fault or negligence on his part, was struck, bruised, seriously injured and made very sick and sore, and both the upper and lower ends of the "femur," or thigh bone of his right leg were fractured by the falling of the aforesaid eaves, or part of said defendant's dwelling projecting over the side walk as hereinbefore alleged.

IV.

That by reason of his being so struck, bruised, seriously injured and made very sick and sore, and the ends of his "femur"
3 or thigh bone being fractured as aforesaid, the plaintiff, since receiving said injuries has been, and for a long time to come will be kept to his bed and detained from his business, and has been compelled, and will be compelled to expend large sums of money for medical attendance, medicines and nursing, and has been made permanently lame, to his damage Twelve Thousand (12,000.00) Dollars.

Wherefore the plaintiff demands the judgment of this Court for the sum of Twelve Thousand Dollars, together with the costs of this suit.

HORTON & CORNWELL,
Attorneys for Plaintiff.

ISLAND OF PORTO RICO,
City of Mayaguez, ss:

Felix Guzman, being by me first duly sworn, deposes and says: That he is the person whose name appears as plaintiff in the above complaint; That the above complaint was translated to him into the Spanish language: That he knows the contents thereof, and that the facts therein stated are true to the best of his knowledge.

FELIX GUZMAN.

Sworn to and subscribed before me this 21st day of November, 1907.

H. H. SCOVILLE, *Clerk,*
By RICARDO NADAL, *Deputy.*

[Seal of the District Court of the United States for P. R.]

4 *Answer.*

(Filed December 24, 1907.)

Law No. —. Mayaguez.

FELIX GUZMAN
vs.
JULIAN HERENCIA.

Comes now the defendant above named by his attorney Salvador Mestre and for answer to the complaint of plaintiff filed herein says:

(1.) Admits each and every allegation, matter and thing contained in paragraph first of said complaint.

(2.) Defendant denies each and every allegation contained in paragraph second of said complaint as it is not true that the eaves of the house described in paragraph first of the complaint were negligently allowed by this defendant to be and remain in a dangerous condition.

(3.) Defendant specifically denies each and every allegation contained in paragraph third of said complaint and *and* that there was fault or negligence in the part of this defendant in the injuries and bruises alleged by the plaintiff. This defendant also denies that the injuries received by plaintiff are serious to the extent alleged in the complaint.

(4.) Defendant denies that plaintiff has suffered the damages alleged in paragraph fourth of the complaint.

(5.) And this defendant avers that the house described in the complaint was in a perfect condition and that it did not indicate any danger, and that the falling of the eaves of the said house belonging to this defendant was due to an unexpected and unforeseen event by which this defendant is not liable.

SALVADOR MESTRE,
Attorney for Defendant.

5 ISLAND OF PORTO RICO,
District of Mayaguez, ss:

Julián Herecia, being first duly sworn, deposes and says:

That he is the defendant in the above entitled action, that the foregoing answer has been translated to him into Spanish, that he knows the contents thereof and that the facts contained in it are true to the best of his knowledge.

J. HERENCIA,
Defendant.

Subscribed and sworn to before me by Julián Herencia this 24th day of December, A. D. 1907.

JOSE DE DIEGO,
Notary Public.

Copy received this 26th day of December, 1907.

HORTON & CORNWELL,
Attorneys for Plaintiff.

Notice of and Motion for Judgment on the Pleadings.

(Filed January 9, 1908.)

No. 193.

FELIX GUZMAN
vs.
JULIÁN HERENCIA.

To Salvador Mestre, Esq., attorney for the above-named plaintiff.

SIR: Please take notice that we will move this Honorable Court, at the court room, in the United States Court building, in this City, on the twenty-seventh day of January, 1908, at nine o'clock in the forenoon, or as soon thereafter as counsel can be heard, for a
6 judgment on the pleadings in favor of the plaintiff herein, and for such other and further relief as may be just. Said motion will be made upon the ground that the answer herein filed by you is insufficient and does not controvert the allegations of the complaint of plaintiff, and will be supported by the pleadings, papers and records in the above cause.

HORTON & CORNWELL,
Attorneys for the Plaintiff.

Due and proper service of the above notice is hereby admitted on this 8th day of January, 1908.

SALVADOR MESTRE,
Attorney for Defendant.

No. 193.

FELIX GUZMAN
vs.
JULIAN HERENCIA.

Now comes the above named plaintiff through his attorneys Horton & Cornwell, and moves this honorable court for a judgment on the pleadings in favor of the plaintiff on the ground that the defendant's answer is insufficient to constitute a defense to plaintiff's cause of action.

HORTON & CORNWELL,
Attorneys for Plaintiff.

Journal Entry.

February 25th, 1908.

FELIX GUZMAN
vs.
JULIAN HERENCIA.

Motion for judgment on the pleadings heretofore filed herein by plaintiff, is now called and heard, Messrs. Horton & Cornwell for and
Salvador Mestre, of counsel for defendant, in opposition
7 thereto, and the same is overruled.

Journal Entry.

February 26, 1908.

FELIX GUZMAN
vs.
JULIÁN HERENCIA.

This cause is now called, both sides answer ready and thereupon a jury composed of the following named persons, to wit: S. V. Lippit, Pedro Gandía, Florencio Vera, Hipólito Cuebas, Chas. R. Manes, L. Villalón, A. Simonpietri, Benigno Ramirez, R. Delgado, Juan Mayoral, C. F. Storer, and David Storer, is duly impanelled and sworn to try the issues joined herein and hear part of the evidence for plaintiff.

In Re HIPÓLITO CUEBAS, Regular Juror on This Panel.

And now Hipólito Cuebas, one of the jurors forming the panel trying this case, becoming suddenly ill, during a recess, both sides by their respective attorneys agreeing thereto, sign the following Stipulation, which is filed and entered of record, to wit:

Stipulation.

FELIX GUZMAN
vs.
JULIÁN HERENCIA.

We, the counsel in the above entitled cause, owing to the fact that one of the jurors, Mr. Hipólito Cuevas, has been taken suddenly
ill and cannot attend, at the request of the Court, hereby agree
8 that the cause may proceed and be tried by eleven jurors with the same effect as though twelve jurors were present, and their verdict shall be received in the premises.

(Signed) F. L. CORNWELL,
Attorney for Plaintiff.
SALVADOR MESTRE,
Attorney for Defendant.

The Jury as now composed of the eleven remaining jurors hears the conclusion of the testimony on behalf of the plaintiff, and part of the testimony for the defendant.

Journal Entry.

February 27th, 1908.

FELIX GUZMAN
vs.
JULIÁN HERENCIA.

Resumed.—The jury hears the conclusion of the testimony on behalf of the defendant and testimony in rebuttal for plaintiff, which completes all the evidence offered in the case, the argument of counsel and the instructions of the Court as to the law in the case, and then retires, and afterwards comes back with the following verdict, to wit:

"We, the jury, find for the plaintiff, and assess his damages at the sum of $9,000.00 U. S. Cy.

(Signed) P. GANDIA, *Foreman.*"

Judgment.

This case coming on to be heard, both parties by their attorneys answer ready, and a jury being duly sworn to try the issues, they heard the proofs, the arguments of counsel, and the instructions of the Court, and retired to the jury room to consider of their verdict, and thereafter returned into court a verdict in favor of the
9 plaintiff, Felix Guzman, and against the defendant Julián Herencia, as follows: We the Jury find for the plaintiff and assess his damages at the sum of $9,000.00 U. S. Cy.

(Sgd.) P. GANDÍA, *Foreman.*

Wherefore it is Ordered and Adjudged that the plaintiff Felix Guzman do have and recover of and from the defendant Julián Herencia the sum of Nine Thousand Dollars ($9,000.00) together with interest thereon from the date of this judgment at the rate of six per cent. (6%) per annum with the costs of this suit, to be taxed by the Clerk, and that he have execution therefor.

Dated, Feb'y 27, 1908.

(Sgd.) B. S. RODEY, *Judge.*

Notice of Intention to Move for New Trial.

(Filed March 2nd, 1908.)

Law. No. 193.

FELIX GUZMAN
vs.
JULIÁN HERENCIA.

To Horton & Cornwell, attorneys for plaintiff, and to Felix Guzman, plaintiff:

Please take notice that defendant Julián Herencia intends to move the Court to vacate the verdict and set aside the judgment entered in the above entitled cause and to grant a new trial of said cause, upon the following grounds, to wit:

I. Newly discovered evidence material to the defendant which he could not, with reasonable diligence, have discovered and produced at the trial.

II. Excessive damages appearing to have been given under the influence of passion or prejudice.

III. Insufficiency of the evidence to justify the verdict.

IV. That the verdict is against the law.

V. Errors of law occurring at the trial and excepted to by the defendant, to wit:

(A.) The defendant produced the witness José Alicea for the purpose of showing that plaintiff was intoxicated to the extent of bringing about his injury, which in the light of the fact that Eduardo Fort, who was standing with plaintiff at the time of the accident was warned of the falling eaves and escaped injury by promptly leaving the place, was material to defendant's cause, which offer the Court overruled to which ruling the defendant then and there excepted, and the exception was allowed:

(B.) The Court erred in refusing to admit the testimony of Doctor Isaac Gonzalez Martinez, which would have tended to show that the shortening of the plaintiff's leg was due to the mistake of the physicians in setting the same, to which ruling the defendant then and there excepted, and the same was allowed.

This motion will be based upon affidavits to be served upon you and upon the minutes of the Court.

This motion will be presented to the Honorable Judge of said Court at his Chambers at San Juan, P. R., on the seventh day of March, 1908, at ten o'clock in the forenoon of said day or as soon thereafter as counsel can be heard.

Dated at Mayaguez the second day of March, 1908.

WILLIS SWEET,
SALVADOR MESTRE,
Attorneys for Defendant.

Motion for New Trial.

(Filed March 2nd, 1908.)

Law. No. 193.

FELIX GUZMAN
vs.
JULIÁN HERENCIA.

Comes now the above named defendant by his attorneys
11 Salvador Mestre and Willis Sweet and moves the Court to vacate the verdict and set aside the judgment rendered in the above entitled action on the 27th day of February, 1908, and to grant the defendant a new trial of this cause for the following reasons which affect materially his substantial rights, to wit:

First. That the evidence is not sufficient to justify the verdict of the jury,

(A.) Because the evidence failed to prove that the defendant was aware of the alleged dangerous state of the eaves of the house which caused the injury complained of or that the defendant did not act with all necessary diligence or care to prevent the falling of said eaves.

(B.) That the evidence failed to prove that the house was in a ruinous condition or in need of repair at the time of the accident, but on the contrary it was shown that the falling of the eaves was due to vis mayor or the act of God manifested by the torrents of rain that fell during the day of the accident and for several days prior thereto.

(C.) That the evidence failed to prove that the defendant acted with such wanton or gross negligence as to entitle the plaintiff to recover exemplary or punitive damages.

(D.) That the evidence failed to prove that the plaintiff will be unable to follow his avocation in life, or that his permanent earning capacity was affected by said accident.

Second. That the verdict of the jury is against law in that it violates the instructions given by the Court, for that the Court charged the Jury not to find exemplary damages and in view of the facts stated in paragraphs "A," "B," "C" and "D" above, it is evident that the sum going to make up the verdict is largely exemplary in character.

12 Third. That excessive damages appear to have been given under the influence of passion or prejudice.

Fourth. That the defendant has discovered new and material evidence which could not by due diligence have been produced at the trial thereof as shown by the affidavits of plaintiff and to the effect that the plaintiff was intoxicated on the evening in question to such an extent that it affected his judgment, and that in consequence thereof he was negligent to a degree of seriously contributing to said accident, in that sufficient warning was given to have en-

abled plaintiff to have avoided the injury following the result of the falling eaves, and that had he been sober the said injury would not have occurred.

Fifth. Errors in law occurring at the trial to which defendant duly excepted, and which exceptions were allowed; and the defendant, with reference thereto, will base this motion upon the minutes of the Court.

These were as follows:

The Court allowed a juror to remain in the jury box though he stated that he was an enemy of the defendant, or a personal enemy, or words to that effect, to which the defendant excepted and the exception was allowed.

The Court erred in instructing the jury that the defendant was bound to exercise, not ordinary but *extraordinary* care to see that the eaves of his house, extended over the side walk, were kept in proper repair.

The Court erred in refusing to allow the witness José Alicea to testify that plaintiff was intoxicated to the extent of bringing about his injury, which in the light of the fact that Eduardo Fort, who was standing with plaintiff at the time of the accident was warned of the falling eaves and escaped injury by promptly leaving the place, which offer the Court overruled, to which the defendant, then and there excepted, and the exception was allowed.

(B.) The Court erred in refusing to admit the testimony of Dr. Isaac Gonzales Martinez, which would have tended to show that the shortening of the plaintiff's leg was due to the mistake of the physician in setting the same, to which ruling the defendant then and there excepted, and the same was allowed.

Mayaguez, March 2nd, 1908.

WILLIS SWEET,
SALVADOR MESTRE,
Attorneys for Defendant.

Affidavit.

FELIX GUZMAN
vs.
JULIÁN HERENCIA.

THE UNITED STATES OF AMERICA,
District of Porto Rico, ss:

Julian Herencia being first duly sworn, says: I am the defendant named in the above entitled action; I am acquainted with Rafael Felices a member of the Insular Police and have heard his affidavit in support of my Motion for a new trial in this cause translated; I did not know that said Rafael Felices was a witness to the accident to plaintiff in this cause and upon which this action is based, until after the trial hereof; Indeed, I did not know that said Felices knew anything of the facts until he himself told them to me after the trial.

In this connection I will say that it has been difficult for me to obtain information from the first, because of a natural sympathy or sentiment always running in favor of the person who has been injured.

I am advised by my counsel that the testimony of said Felices is important because of his having been an eye witness to the accident, although I had used every endeavor prior to the trial to advise
14 the Court fully as to the facts.

Translated to me by Salvador Mestre.

J. HERENCIA,

Subscribed and sworn before me this 2nd day of March, 1908.

JOHN L. GAY,
Clerk of the U. S. Dis. Court for P. R.,
By RICARDO NADAL, *Deputy.*

Affidavit.

Law. No. 193.

FELIX GUZMAN
vs.
JULIÁN HERENCIA.

UNITED STATES OF AMERICA,
District of Porto Rico, ss:

I, Rafael Felices, being first duly sworn say: On the night of the fourth day of November, 1907, I was a member of the Insular Police of Porto Rico, and as such was on duty at the city of Mayaguez, between twelve and one o'clock that night, I saw the plaintiff and Eduardo Ford passing along the street at corner of Candelaria and Basora streets and saw the accident which occurred to the plaintiff at that time caused by the falling of the eaves of the building by which they were walking.

I hurried to the plaintiff and assisted him to the dispensary of the municipality.

It is my opinion that plaintiff was intoxicated and this opinion is based upon the strong smell of rom which came from his person and from his general conduct, and language, such as swinging his arms, beating himself, and striking those who were assisting him, and his loud and extravagant use of profane and vulgar language.

In short he had the general appearance, conduct and
15 manner of a man who was intoxicated.

I was subpœnaed by the plaintiff as a witness in this cause but he did not call upon me to testify.

I had never conversed with the defendant or his attorneys, prior to the trial of said cause. This affidavit has been translated to me by Salvador Mestre.

RAFAEL FELICES.

Subscribed and sworn to before me on the second day of March, 1908.

JOHN L. GAY,
Clerk of the District Court of the United States for Porto Rico,
By RICARDO NADAL, *Deputy.*

[Seal of the District Court of the United States for Porto Rico.]

Due service of the foregoing notice, motion and two affidavits on motion for new trial accepted by copy this 2nd day of March, 1908.

____ ____,
Attorneys for Plaintiff.

Journal Entry.

March 7, 1908.

FELIX GUZMAN
vs.
JULIÁN HERENCIA.

In this cause the matter of defendant's motion for a new trial comes on to be heard and the parties not being completely ready in the premises, the hearing hereof is by the Court set at San Juan, for Saturday, the 14th instant at ten o'clock A. M., of said day, to which setting, on the ground that it is out of the district, and for other reasons, the plaintiff by his attorney F. L. Cornwell, Esq., objects and thereafter duly excepts.

16 *Journal Entry.*

March 18, 1908.

No. 193.

FELIX GUZMAN
vs.
JULIÁN HERENCIA.

This cause comes on to be heard upon the motion of the defendant to set aside the verdict of the jury and grant a new trial herein, and after argument in that behalf by Willis Sweet, Esq., for the defendant and F. L. Cornwell for the plaintiff, the motion is taken under advisement, briefs to be filed by Monday, March 23rd, instant.

Journal Entry.

March 28, 1908.

No. 193.

FELIX GUZMAN
vs.
JULIAN HERENCIA.

In this cause the Court files an opinion and in accordance therewith it is ordered that the motion for a new trial herein be, and the same hereby is, overruled. Whereupon the defendant by his attorney duly excepts to such action of the Court, and prays for leave to file a writ of error from said decision to the Supreme Court of the United States, and for the fixing of a bond to act as a supersedeas in the premises; and counsel for the opposite party being present, the Court thereupon grants said request for said writ of error, and fixes the amount of the bond in the sum of $15,000.00, the same to be filed and approved within the time allowed by law.

Petition for Writ of Error.

(Filed April 6, 1908).

FELIX GUZMAN
vs.
JULIÁN HERENCIA.

17 Julián Herencia, defendant in the above entitled cause, feeling himself aggrieved by the verdict of the Jury, and the judgment entered on the — day of —— 1908, comes now by Sweet, Rossy & Campillo, his attorneys, and petitions said Court for an order allowing said defendant to prosecute a Writ of Error to the Honorable the Supreme Court of the United States in that behalf made and provided, and also that an order be made fixing the amount of security which the defendant shall give and furnish upon said writ of error, and that upon the giving of such security all further proceedings in this Court be suspended and stayed until the determination of said writ of error by said Supreme Court of the United States.

And your petitioner will ever pray.

SWEET, ROSSY & CAMPILLO,
Per S.,

Attorneys for Defendant.

Journal Entry.

April 6, 1908.

No. 193.

FELIX GUZMAN
vs.
JULIÁN HERENCIA.

The defendant Julián Herencia having this day filed his petition for a writ of error from the decision and judgment made herein to the Honorable the Supreme Court of the United States, for the fixing the amount of the supersedeas bond, and for an extension of time for presenting and settling his bill of exceptions in this cause, it is hereby;

Ordered that said writ of error be allowed; that sixty days be given from this date for the presentation of his said bill of exceptions; that the amount of the supersedeas bond be fixed at fifteen thousand dollars; and that upon the filing of such bond, with good and sufficient sureties approved by the Court, further proceedings in
18 this cause be stayed until the final disposition of the same in the Supreme Court of the United States.

Done and ordered in open court, at San Juan, in said District this 6th day of April, A. D. 1908.

(Signed) B. S. RODEY, *Judge.*

Bond on Writ of Error.

(Filed April 10th, 1908.)

FELIX GUZMAN
vs.
JULIÁN HERENCIA.

Know all men by these presents, that we, Julián Herencia, as principal, and A. Alvarez Nava, and Anacleto Agudo, as sureties, are held and firmly bound unto Felix Guzman, plaintiff above named, in the sum of $15,000 to be paid to the said Felix Guzman, his executors or administrators, to which payment well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our successors, representatives and assigns firmly by these presents.

Sealed with our seals and dated the 6th day of April, 1908.

Whereas, the above named defendant, Julian Herencia, has sued out a writ of error to the Supreme Court of the United States, to reverse the judgment in the above entitled cause by the District Court of the United States for Porto Rico.

Now, therefore, the condition of this obligation is such that if the above named Julián Herencia, shall prosecute said writ to effect

and answer all costs and damages, if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and virtue.

JULIAN HERENCIA,
ANTONIO ALV. NAVA,
ANACLETO AGUDO.

Witness:
ANTONIO HIGUERA.

Approved this 10th day of April, 1908.
B. S. RODEY,
Dis. Judge.

19 Antonio Alv. Nava, one of the sureties on the foregoing bond, being duly sworn, says that he is worth the sum of $15,000 in visible property in the Island of Porto Rico subject to execution.

ANTONIO ALV. NAVA.

Subscribed and sworn to before me, this 6th day of April, 1908.
GABRIEL GUERRA.
(Seal of Notary Public.)

Anacleto Agudo, one of the sureties on the foregoing bond, being duly sworn, says that he is worth the sum of $15,000 in visible property in the Island of Porto Rico subject to execution.

ANACLETO AGUDO.

Subscribed and sworn to before me, this 6th day of April, 1908.
GABRIEL GUERRA.
(Seal of Notary Public.)

Journal Entry.

April 10, 1908.

FELIX GUZMAN
vs.
JULIÁN HERENCIA.

The matter of the approval of the supersedeas bond herein comes on to be heard on the objections of F. L. Cornwell, Esq., counsel for plaintiff, and in that behalf, the Court causes the defendant to bring the bondsmen before the Court and the same having been done, and the Court having examined said bondsmen Messrs. Antonio Alvarez Nava and Anacleto Agudo severally and personally as to their property, finds them duly qualified in the premises; and, therefore it is

Ordered that the said bond be, and the same hereby is approved as sufficient in form and substance, and that the same be and
20 hereby is declared to be a supersedeas in the premises.

Assignment of Errors.

(Filed Apr. 10, 1908.)

FELIX GUZMAN
vs.
JULIAN HERENCIA.

The defendant in this action, in connection with his petition for a writ of error, makes the following assignment of errors which he avers occurred upon the trial of this cause, to wit:

I. That the Court erred in entering judgment for the amount of the verdict herein, to wit, nine thousand ($9,000) dollars, because the same is so great and excessive as to show upon its face that it is the result of passion, prejudice or mistake.

II. That the Court erred in striking out the testimony of the witness Juana Lopez produced on behalf of the defendant, this testimony being in substance that she with her children had lived in the house in question for two years prior to the falling of the eave thereof, and that she had never previous to that time noticed any indication of bad condition or need of repair in the eave that fell, and that it showed no signs of decay or bad condition.

III. That the Court erred in striking out the testimony of the witness Claudio Rebollo produced on behalf of the defendant, this testimony being in substance that he had lived in the house in question in this case for three years prior to the falling of the eave thereof which eave was in front of his door, that he had seen
21 this eave and had never observed anything wrong with the same.

IV. That the Court erred in refusing to allow the witness Doctor Gonzalez called on behalf of the defendant, to qualify and give testimony as to how the influence of alcohol upon the system of a person injured as this plaintiff was, would affect the treatment of his injuries, and the results consequent upon any change of treatment.

Wherefore the defendant prays that the judgment of said District Court may be reversed.

SWEET, ROSSY & CAMPILLO,
Attorneys for Defendant.

22 In the District Court of the United States for Porto Rico.

FELIX GUZMAN
vs.
JULIAN HERENCIA.

Bill of Exceptions.

(Filed May 16, 1908.)

23 In the District Court of the United States for Porto Rico.

FELIX GUZMAN
vs.
JULIAN HERENCIA.

Bill of Exceptions.

Be it remembered that at a term of the District Court of the United States for Porto Rico held in the City of Mayaguez on the 26th day of February, A. D. 1908, a cause therein pending wherein Felix Guzman was plaintiff and Julian Herencia defendant came on to be heard before the Honorable Bernard S. Rodey, Judge of said Court, at which time came the respective parties by their attorneys, and thereupon the said issues in manner aforesaid joined between the said parties came on to be tried, and the jurors of the jury aforesaid whereof mention is within made, being called likewise, came and were sworn to try said issues upon the merits of said cause in the manner aforesaid joined.

And thereupon the plaintiff, to maintain the issues on his part, appeared as a witness in said cause, and having been first duly sworn, testified as follows:

Direct examination by Mr. CORNWELL:

Q. What is your name?
A. Felix Guzman.
Q. Where do you reside, Mr. Guzman?
A. Calle Mendez Vigo, No. 77.
Q. What City?
A. Mayaguez.
Q. How long have you resided in Mayaguez?
A. Now, 5 months and 7 days, but previously I had lived
24 here. I was married here but I was in Cuba. I spent 7 years in Cuba but the rest of my life here.
Q. What is your business or occupation, Mr. Guzman?
A. My profession now is book-keeper. Previously I was professor of music.
Q. You are the plaintiff in this case, are you not?
A. Yes, sir.

Q. Where were you on the night of Nov. 4th?

The COURT: Last.
Mr. CORNWELL: Last.

A. During the night we left at about quarter to 12 from the Bank where we had been doing some work.
Q. Where did you go?
A. From there we left in a carriage, the Cashier, the Assistant Cashier, and myself.
The COURT: Three of them?
A. Yes, sir; three.
Mr. CORNWELL: Where did you go?
A. The Cashier remained at his house at Mendezvigo; staid there.
Q. Then where did you go?
A. The other gentlemen and myself went to the café called "La Bolsa," which is at the corner, where we went to have some supper.
Q. How long did you stay in the Café?
A. About half an hour.
Q. Then what did you do?
A. From there we left to go to our homes.
The COURT: Afoot or in this carriage?
A. On foot; we ordered the carriage out, or away.
Q. Where did you start from and which direction did you go in?
A. We went through Candalaria Street, something which
25 I have never done; was not in the habit of doing.
Q. Well, tell what happened.
A. Upon arriving under the roof on the sidewalk of that house——

The COURT:

Q. Well, what house?
A. Of house No. 36.
The COURT: Yes, and what happened?
A. The other fellow that was coming with me had crossed the street. Upon leaving the street to take the street where my house is at Mendezvigo Street, then the eave of that house fell down.

The COURT:

Q. Well, did it strike you?
A. It broke my leg and two sides.
Q. Well, tell as near as you can recollect, what happened; if you remained in your senses, and so on, and what happened.
A. No, I did not lose consciousness.

Mr. CORNWELL:

Q. You said you walked down Candalaria Street. Is not that known by the name of McKinley Street also? It has been changed by the City Council.

Mr. CORNWELL: I suppose that you will admit that?
Mr. MESTRE: Yes.

Q. Well, what happened after the roof fell on you?

The COURT: Go on and tell something about it.

A. When that happened, the boy that was with me dropped down to the floor on account of the shock. After I could extricate myself from the rubbish, after they took the stones off of me, after taking the stones off, I had large pieces of the stones on me.

The COURT: Well, ask him if he was injured.

A. When I saw him, when I was trying to get up, when
26 I could get out this leg from under the tiles, then on taking out the other one, I had one of the beams across my leg.

Q. Well, what happened then? Let him go on and tell the story.

A. Then as I could not take it out myself, I called for him and then he came and then I told him to ask for help.

Q. Well, then what happened? Go on.

A. Then some young man from the house of Santiago Sandalio came over, and a policeman came around, and some other people whom I do not remember.

Q. Well, what happened? Did they carry you off, or did you walk?

A. I tried to walk but could not.

Q. What did they do with you?

A. They took me under their arms and in that way they took me to the City Dispensary.

Mr. CORNWELL: And there did you receive medical attention?

A. Yes, sir. The first cure was made by Dr. Frasqueri.

Q. And from there where did they move you?

A. And from there I was taken in a hammock to my house, a stretcher to my house.

Q. How long were you in the City Dispensary?

A. It was about half an hour.

The COURT: Go on and show his present condition.

Q. At home, did you receive medical attention, when you arrived home?

A. After arriving at my house my wife and my brother-in-law sent for the doctors, and Dr. Font came over and Dr. Giménez.

Q. Then what happened?

A. And they examined the leg, then they decided to put on a plaster cast.

27 Q. How long were you in bed?

A. Up to now I have been in bed but under medical attention with them I have been about three months but they still are treating me.

Q. State how much you suffered in that accident, if you can.

A. It has been too much.

The COURT: I never could see much in that question, Mr. Cornwell. The jury can always judge how much suffering he had. The counsel can argue to the jury about that.

Q. What physicians are attending you now?

A. Dr. Giménez and Dr. Vadi; and now Dr. Giménez.

Q. What is the condition of your leg now?
A. I feel that I cannot set my foot on the floor but with continuous pain always.
Q. You are still under medical attention?
A. Yes, sir.
Q. What was your occupation at the time of the accident?
A. I was temporarily employed in the Bank with an offer or promise to be employed permanently.
Q. What salary did you make at the Bank?
A. As I had not finished the work which I had started, which was some old work, some back work, I did not settle my account, but the Cashier told me I could count on $20.00 a week.
Q. Did you have any other business besides working in the Bank?
A. No, sir.
Q. Did you do book-keeping for outside people?
A. Only to Mr. Juanito Bianchi. I have worked for him doing private work extra hours.
28 Q. What kind of work were you doing for Mr. Bianchi?
A. Book-keeping.
Q. What did he pay you?
A. He paid me according to the amount of work; sometimes he paid me $25.00, and other amounts, as it was not permanent.
Q. Were you doing that work in addition to your work at the Bank?
A. Outside hours, when I was at leisure.
Q. What was your income generally a few years before your injury from your work?

The COURT: On the average?
Mr. CORNWELL: On the average? Take the five or six years before.

A. Here, I cannot tell, because I was for about two months without work.
The COURT: I know, but then a man can tell what his average income was for two or three years before any particular time.
A. Two or three years ago I earned in Havana $160.00 salary.
Mr. CORNWELL: Is that gold?
A. Yes, sir.
The COURT: Per month?
A. Monthly? Yes.
Q. How much of a family have you?
A. Six children and my wife.
Q. Have you any other means of support outside of your labor.
A. No, sir. A. I have no other work. I depend on my work.
Q. What sort of work was it you did when you made about $160.00 — month?
A. I was employed in the theatre and a business firm in Havana.
Q. Well, what was your average income in the Island of Porto Rico while you were here?
A. When I was here before I had $75.00 per month as sec-
29 retary and bookkeeper of the Railroad Company of narrow gauge.
Mr. CORNWELL: That was before you went to Cuba?

A. Yes, sir.
Q. How long ago was that?

Mr. CORNWELL: Because that was way back when he was a young man, Your Honor.

A. Early in the American occupation.
Q. How old is your oldest child?

The COURT: That will be excluded specifically by instruction.

A. 18 years.
Q. Are you able to work now?
A. I have not yet been able to work.
Q. How do you feel as to your physical condition?
A. I am getting better but I cannot use my leg yet.
Q. Where were you when the roof fell on you?
A. I was walking below.
Q. On what?
A. On the sidewalk; on crossing the ditch.
Q. That is a public sidewalk of the City, is it not?
A. A public sidewalk of the City.

Cross-examination by Mr. MESTRE:

Q. How old are you?
A. 45 years.
Q. That work you said you were doing for Mr. Bianchi lately, when was that, before the accident or after the accident?
A. Before the accident.
Q. How long did you work for the Bank of Porto Rico?
A. Now only.
Q. And for how long?
A. For two months and a half.
30 Q. And during that time, did you say that they did not fix your salary.
A. They had not fixed my salary because I was doing back work.
Q. How much did you earn during those two months? How much did they pay you?
A. $135.00 or $145.00.
Q. Did not they fix your salary?
A. I took it on account; I took that on account.
Q. But did not you have a salary?
A. I was not under a fixed salary; a fixed compensation.
Q. And during that time, you had to work at night-time?
A. On certain occasions, several times.
Q. That money you took, did you take it by the month or by the week?
A. Weekly.
Q. How much did you take every week?
A. $15.00 or $20.00; some weeks $15 and some $20, and what I needed, more or less.
Q. You said that the Cashier told you that you would not earn less than $20 a week.
A. Yes, sir.

Q. Is the Cashier the one that fixes the salaries at the Bank?
A. I do not think that he has the authority but perhaps he had made an agreement.
Q. Was you a temporary or permanent employé of the Bank?
A. I was temporarily employed under a promise that I would be employed permanently.
Q. Who made you that promise?
A. Mr. Graña, and the same Cashier.
Q. Who was Graña?
A. The director or manager of the Bank.
31 Q. Now you said that you left the bank at what time that night, the night of the accident?
A. At a quarter to twelve.
Q. And what time did the accident occur?
A. About half past twelve.
Q. What were you doing at the Café that time of the night?
A. We went there to supper.
Q. Did you supper?
A. Yes, sir.
Q. Did you take any wine with your supper?

Mr. CORNWELL: Object to that as immaterial.
The COURT: It will be sustained. Supposing he was drunk and went out there and that roof fell on him, it would not be contributory negligence.
Mr. MESTRE: But it might be material if the man who was with him was able to get out of the way. A man who was in good condition might hear the noise and jump out, while if a man was drunk he would not hear it. I expect to show that the other man was able to get out of the way.
The COURT: I will let that in on that promise.
Mr. CORNWELL: Note an exception.

A. Yes, sir.
Q. How many times did you take wine, how much wine did you take?
A. A glass of wine.
Q. Did you take any other kind of liquor?
A. No, sir.
Q. Did you take any brandy or rum?
A. No, sir.
Q. Who was with you at the Café?
A. Mr. Font, the young man who accompanied me.
32 Q. Anybody else?
A. No, sir.
Q. Are you sure that it was half past twelve when you left the café?
A. More or less, it might be half past twelve. I did not have the watch in my hand.

The COURT: How would that be material, Mr. Mestre?
Mr. MESTRE: I might prove that it was much later.
The COURT: How would that be material?

Mr. MESTRE: To show that he spent more time at the café.
The COURT: You have his answer.

Q. When you left the café, did you say that you were going home?
A. Yes, through Candelaria Street.
Q. Did you go anywhere else?
A. No, sir.

Mr. CORNWELL: I object to that question.
The COURT: The objection is overruled.
Mr. CORNWELL: Note an exception.

Q. Is there a café on Mendezvigo Street?
A. Yes, sir.
Q. Is your house on Candelaria Street?
A. Yes, sir.
Q. Candelaria or McKinley Street, is it parallel to Mendezvigo Street?
A. It is not parallel.
Q. I mean do they run in the same direction.
A. Yes.
Q. Who had the inside of the sidewalk when you walked down?
The COURT: When you were injured.
A. I did; I was.

Mr. MESTRE:

Q. When you sent for the doctors, did they cure you that same night?

The COURT: Examine you.

33 A. They only examined me. The next day the operation was performed.

Mr. MESTRE:

Q. They did not operate that night?
A. No, they only made the first cure in the dispensary, the first aid.
Q. Do you know why they did not operate that night?

Mr. CORNWELL: I object to that. It calls for the opinion of the witness.

The COURT: I will suggest to counsel you no doubt have doctors here to prove that by?

Mr. MESTRE: I might prove it is the fault of the physicians or doctors.

The COURT: You have his answer on that. Is that all?

Q. Do you remember who took you home?

The COURT: From the scene of the accident?
Mr. MESTRE: No, from the drug-store?

A. From the Dispensary I was carried home. I do not know who they were.

The COURT: You said you did not lose consciousness?

A. I did not lose consciousness but I do not remember when I was in the stretcher, who carried me, because it was covered.

Mr. MESTRE:

Q. Did it rain much that night?
A. It rained pretty hard early in the night but at that time it was only drizzling.

Mr. CORNWELL: I ask to strike out all that testimony about his drinking.
The COURT: I will not strike it out. I will instruct against it. He may connect it up in some way. At the end of the case I will rule on it.
Mr. MESTRE: That is all.

Mr. CORNWELL: What kind of wine was it you drank and what was the size of the glass?
A. Half a glass.
34 Q. Was it a regular wine glass?
A. Yes, a regular half glass of wine.

Witness retires.

35 NICOLAS GIMENEZ, being called as a witness in behalf of plaintiff, was duly sworn and testified as follows:

Direct examination by Mr. CORNWELL:

Q. What is your name and profession?
A. Doctor of medicine.
Q. Where do you reside, doctor?
A. Mayaguez.
Q. How long have you been in the practice of medicine?
A. Twelve years.
Q. Are you a surgeon, doctor?
A. Yes, sir.
Q. Your specialty is surgery?
A. I am the surgeon of the city hospital of the city of Mayaguez.
Q. You make a specialty of surgery work?
A. Yes.
Q. How long have you been practicing medicine and surgery, doctor?
A. For twelve years.
Q. Do you know the plaintiff in this case, Felix Guzman?
A. Yes.
Q. Were you called to attend him about the fourth of November?
A. I was called about one o'clock by his family; one a. m.
Q. Was he at his house when you were called?
A. He was already at his house when I was called.
Q. What was his condition when you arrived; was he suffering very much?
A. He was suffering very much; he was delirious on account of the pain he had; traumatic delirium on account of the pain.
Q. Did you examine him then as to his condition, doctor?
A. I did.

36 Q. What condition did you find him in?

A. He was examined before by Dr. Font, and when I arrived there he had the dressing put on. He had two fractures; one on the upper part of the femur and one lower down.

Q. Illustrate to the jury where it was.

A. One right here (indicating), what we call the surgical neck, and one right here just above the knee.

Q. Were they simple or compound fractures?

A. Simple fractures.

Q. Did you set them, doctor?

A. I set them the same night or the next day.

Q. Who assisted you?

A. Dr. Perea and Dr. Vadi.

Q. Have you been in attendance on him since then, doctor?

A. Yes, sir.

Q. Is he still under your care?

A. Yes, sir.

Q. State to the Court what was the nature of the operation you performed.

A. The operation performed in all kinds of fractures; to make application of the ends of the bone and make extension and contra-extension, which is usual. It could not be made very well on account of the fracture lower down on the bone, and for that reason he has a permanent shortening of the leg.

Q. What will his general health conditions be? Will this affect them?

A. He will be lame all his life.

Q. Generally, will it affect his health, this accident?

A. No.

37 Q. How long has he been in bed, doctor?

A. Well, he has been in bed,—that was the fourth of November. He stayed in bed for about two months.

Q. And he will always be a cripple?

A. He always will be a cripple.

Q. Did he suffer much during those four months, doctor?

A. Yes.

Q. Constant, was it?

A. Yes, sir.

Q. What is his condition now? Is he well or is he still suffering?

A. He is still suffering very much pain in the bones.

Q. How long, in your opinion, before he will be able to return to business of any kind?

A. Two or three months more.

Q. Two or three months before he will be able to attend to any business?

A. Yes.

Q. (Handing the witness a paper.) Is that your account, doctor, for services at that operation?

A. Yes, sir.

Mr. CORNWELL: I offer this in evidence.

Mr. MESTRE: I wouldn't want to admit this until I cross-examine the witness.

The COURT: His own word is better than any paper he can make.

Q. How much did you charge for your services in that operation, doctor?

A. You mean the operation itself or the whole bill?

Q. What will your whole bill be to the 24th of February?

38 A. Four hundred dollars. That includes night calls and everything.

Q. You think that is a reasonable charge, do you, doctor?

A. Yes, sir; I have been called a good many times at night on account of the pain he had and I used morphine and some treatment to allay the pain.

Q. Is there anything else about the case that you want to state, doctor, that will illustrate the condition of the patient?

A. No, sir.

Mr. CORNWELL: Will your Honor allow this bill to go in?

The COURT: No, his word is better.

Cross-examination by Mr. MESTRE:

Q. You said that his right thigh bone, the femur, had suffered two fractures?

A. Yes, sir.

Q. That lower end, what kind of a fracture was that?

A. A simple fracture.

Q. A different kind?

A. I am not coming here to give a description of all kinds of fractures.

Mr. MESTRE: I would like to show what kind of treatment they used and whether it was a proper treatment.

The COURT: He told you what he did and what the fracture was. If you desire to contradict him in any way, call some other expert.

Q. What kind of treatment did you use to cure those?

A. I used the proper treatment in all kinds of fractures. That is an apposition of those ends of the bones, mobilization of

39 the bone and extension and contra-extension.

Q. Did you use any kind of apparatus?

A. It doesn't make any difference. That is the proper treatment; apposition of the bone and extension and contra-extension.

Q. Didn't you use any kind of apparatus?

A. I used the proper kind of apparatus.

Q. Did you use any apparatus?

A. I used the proper apparatus.

The COURT:

Q. State, doctor, what condition you left the man in and what apparatus you did use different from what you have testified to. You have testified to the extension and contra-extension.

A. The general treatment is to put both ends into position and keep them in proper position.

Q. What was it? Was it the Henequien method? Please give us the name of the apparatus you used.

A. No, it was like the Henequien. I used the trinal method and put bandages around the leg.

Q. Do you mean you constructed something to put the limb in?

A. Yes.

Q. What was that made of?

A. Wood splints.

Q. What kind of wood was that you used?

A. That doesn't make any difference, what kind of wood it was.

The COURT: That is not material whether it was birch or maple or whatever it was.

Q. How long after the fractures did you use that apparatus?

The COURT:

Q. How long did it remain on?

Mr. MESTRE:

Q. No, how long after did you put it on?

A. The day after, I used one apparatus, the provisional one, and we kept that apparatus for about twenty days and then changed it after that. We gave chloroform after the twenty days and *and* removed the splints and put new ones on.

Q. But for how long did you use the new one?

A. I cannot tell you how many days.

The COURT:

Q. Was it for two or three months this was kept up?

A. This for one month.

Mr. MESTRE:

Q. Which one of those two fractures will leave that leg shorter than the other?

A. The upper fracture, and that was true because we could not make a proper extension on account of the lower fracture. The extension is always made on the lower end of the bone. As there was a fracture on the lower end of the bone, we could not make a proper extension of the bone.

The COURT:

Q. Couldn't you extend it some by putting a bandage around the thigh above?

A. We did that but we could not make the proper extension on account of the lower fracture.

Mr. MESTRE:

Q. How many inches shorter will be that leg than the other one?

A. It will be about two or three inches.

Q. Do you think that will be a permanent injury?
A. It will be a permanent injury.
Q. Will he be unable to walk?
A. No, he will not be unable to walk, but he will be lame.
Q. Can he walk from one place to another and run?
A. He cannot run; he can walk.

The COURT:

Q. He will have to have either a high sole to his shoe or else be lame?
A. That is what I mean.
Q. But he can use the limb?
41 A. Yes, later on.

Mr. MESTRE:

Q. Will he have any pain all his life in that limb?
A. He has pain now but that will disappear.
Q. How do you know he has pain now?
A. Because he has stated to me.—We have what we call objective and subjective pain; what the patient complains of and what we find out.
Q. How long will it take him to be able to walk and not have any treatment any more?
A. I cannot answer that question.

The COURT:

Q. It will depend on his physical condition?
A. Yes.

Mr. MESTRE:

Q. So that you know that he has pain because he tells you so?

The COURT: The physician will know that a patient suffers pain.

Q. When a fracture is put together, is there a hardened place on the limb?
A. Sometimes we have a disease, what we call callous.
Q. Is that bone healed properly now?
A. What do you mean by "properly"?

The COURT:

Q. Are the fractures healed so that they will be eventually together as well as they can be?
A. Yes, sir.

Witness retires.

42 LUIS VADI, being called as a witness in behalf of plaintiff, was duly sworn and testified as follows:

Direct examination by Mr. CORNWELL:

Q. What is your name?
A. Luis Vadi.

Q. What is your occupation?
A. Physician.
Q. And surgeon?
A. And surgeon.
Q. How long have you been practicing medicine?
A. 34 years.
Q. Of what country are you a citizen, Doctor?
A. French.
Q. Where did you study medicine, Doctor?
A. At Paris.
Q. How long have you been practicing medicine in Porto Rico, Doctor?
A. 30 years.
Q. Do you know the plaintiff in this case, Felix Guzman?
A. Yes, sir.
Q. Were you called to give him professional services on account of two fractures and sickness resulting from them?
A. Yes, sir.
Q. When were you called for the first time, Doctor?
A. I was called the next day after the accident, because the night of the accident I was at Aguadilla.
Q. What was the condition you found Mr. Guzman in when you called?
A. I found him as is often in a person who has suffered a fracture of the leg, with suffering and complaining, crying.
43 Q. Explain to the Court and Jury, Doctor, the nature of those fractures.
A. Two fractures of the femur, one in the point of the inferior third, with the two superior thirds.
Q. Ask the Doctor to explain on his body where they were.
A. There is the joint (indicating). It is a fracture that began at the trocante and the joint of the superior third of the bone with the two inferior thirds along with the joint of the inferior third of the bone; therefore we had two fractures, one inferior and one upper.
Q. Did you assist at the operation of setting them?
A. Yes, sir.
Q. Who was with you?
A. Dr. Giménez, the family physician, and Dr. Perea, the assistant, and myself, and besides, there was another physician, Dr. Font, who also attended to the operation.
Q. Explain to the Court and jury the operation of setting that bone or those two fractures.
A. The setting is made as it is advised by all surgeons and under these circumstances we applied an apparatus which today is admitted by everybody, by the best surgeons, are admitted and accepted because it is considered the best; that apparatus comes from America, from the United States, from the Americans, and has been accepted in Paris and everywhere.
Q. Did you attend him after the setting of the fractures?
A. After the first dressing of the fracture I went twice to visit

him, attend to him. I attended to the renewal of the dressing of the fractures.

Q. He had every care and consideration that you could give him as a Doctor, didn't he?

A. Yes, sir.

44 Q. You and your associates used all the skill that you had in performing the operation?

A. There is not much skill required if it were a fracture of another part but the fracture of the femur is a special fracture. No other question has occupied so much attention of the surgeons as the fracture of the femur. It has been the subject of centuries, the fracture of the femur, and they have not yet arrived at a satisfactory conclusion. The one that has given the best results, is the one that has been used in this case and unfortunate the result arrived at, because there is no surgeon, no matter how eminent, that can assure a complete setting of the two bones, and we had here four.

Q. What will be the result of this fracture of a man's leg?

The COURT: With this man's leg.

A. The shortening of the leg and a lameness.

Mr. CORNWELL: Will this accident affect his general health, Doctor?

A. His general health, with time, will improve.

Q. Is he still sick, Doctor?

A. Yes, sir. Sure.

Q. How long do you think it will be before he completely recovers?

A. I cannot state; it may be four or six months, or more.

Q. He will always be a cripple?

A. Of that leg, of course.

Q. (Handing witness a paper) What is that, Doctor?

A. This is a bill, my fees paid.

Q. What does it amount to, Doctor?

A. $82.00.

Q. It is a receipt for money you received for services attending this man?

A. I have done two operations.

45 Mr. CORNWELL: It is a receipt for money paid. I suppose you will allow that to go in?

The COURT: Yes, that may go in.

(The document in question was then admitted in evidence and marked Exhibit A for plaintiff.)

Mr. MESTRE: I will have to object to this evidence until I question the Doctor as to the time when he had those consultations, because it does not appear from this.

Cross-examination by Mr. MESTRE:

Q. Did you receive payment of that receipt?

A. Yes, sir.

Q. When were those four consultations you had?

A. The first, the next day after the accident, because I was absent, and the other three during the course of the illness, during the day and night, visits for the operation which amounted to $50.00.

Q. How long since the last consultation? That is what I want to find out.

A. I do not remember.

Q. But, more or less?

A. I cannot state; three months have elapsed.

Q. The four consultations took place in the first month?

A. In the first or second, during the first and perhaps during the second.

Q. So it is over one month that you had not examined him?

A. I have seen him many times. In passing by I saw him, but I do not charge him any money for that.

46 Q. But you have not examined him, you have not cured him? Have not treated him?

A. No, sir; I have not treated him. I was not the family physician. I was called for consultation but I have seen him and talked with him and asked of his condition.

Q. How do you know that he is sick now?

A. I repeat, that I have seen him day before yesterday and almost every day and night, and he is a man that complains. His leg is a barometer of the weather.

Q. And how do you know that?

The COURT: A physician knows that.

Witness retires.

47 PEDRO PEREA FAJARDO, being called as a witness in behalf of plaintiff, was duly sworn and testified as follows:

Direct Examination by Mr. CORNWELL:

Q. What is your name?

A. Pedro Perea Fajardo.

Q. Where do you reside, Mr. Fajardo?

A. Here in Mayaguez.

Q. What is your occupation?

A. Physician and surgeon.

Q. Where did you study medicine, doctor?

A. In Columbus, Ohio.

Q. How long have you been practicing in Mayaguez?

A. Two years.

Q. Do you know the plaintiff in this case, Felix Guzman?

A. Yes, sir; I do.

Q. Were you called on to attend him in November last year right after an accident?

A. Yes, sir.

Q. Explain to the court and the jury the nature of that accident.

A. Well, I was called that night, the same night the accident occurred, but I didn't see the leg at that time. They told me that the house physician, Dr. Gimenez, the family physician, saw him that night and prescribed for him and did all that was necessary, and so

I told him that I would see Dr. Gimenez the next day and so I did and the next day I examined the leg and found that he had two fractures of the femur.

Q. Explain to the jury, doctor, where those fractures were.

A. One was of the lower end of the femur, about here (indicating on his own body), and one of the upper end. So in the afternoon of the same day we were there and we put the——

48 The COURT:

Q. You mean those other two physicians that have testified, and yourself?

A. Yes, sir; Dr. Gimenez and Dr. Vadi. We gave him chloroform and he was crying and hallooing and the operation was a little painful, and we put those four ends together and we put the leg in an apparatus that we made there and put a kind of weight to make an extension of the limb and to give contra-extension we raised the bed a little bit so as to have his body on this level (indicating), on an incline. And I called on him most every day for eight days after that because he always was complaining of pain and how uncomfortable he was. And forty days I think it was—I don't remember exactly; I think it was forty or fifty days, we had that limb put in a plaster of paris cast and we kept it there fifteen days I think it was, but as I was not the family physician at this time, I have called on him once in a while. He always called on me when Dr. Gimenez was not in town.

Q. Is he still suffering?

A. He is still suffering. He is still sick. A man like that is always sick.

Q. What will be the result of those two fractures?

A. The result will be that he will always be a crippled man.

The COURT:

Q. One limb shorter than the other?

A. A little shorter.

Q. How much shorter, doctor?

A. I suppose about two or three inches.

Mr. CORNWELL:

Q. (Handing the witness a paper.) What is this, doctor?

A. It is my bill; $180.00.

Q. Is it a receipt or a bill, doctor?

A. It is a receipt.

49 Q. You have received the money?

A. Yes, sir.

Mr. CORNWELL: I offer it in evidence, Your Honor.

The COURT: It is admitted.

(No objection being made to the admission of this paper by counsel for defendant, the same was then admitted in evidence and marked Exhibit B for the plaintiff.)

Q. Has he suffered much from that fracture, doctor?

A. Yes, sir.

Q. How long has he been in bed from it?

A. Well, he was in bed I think about two months, more or less, I cannot remember.

Q. Is he able to attend to business now?

A. Not now.

Q. How long do you think it will be before he can do any business at all?

A. It will be impossible for me to say, but it will be four or five months and then he will still be troubled by pains. You can never tell how long those pains will last.

Mr. CORNWELL: That is all.

Cross-examination by Mr. MESTRE:

Q. Did you receive payment of that bill?

A. Yes, sir.

Q. Who made payment?

A. Mr. Felix.

Q. You say that you took part in the operation?

A. Yes, sir.

50 Q. Did you use any kind of apparatus?

A. We did not use any special apparatus.

Q. You built it yourself?

A. Yes, as is recommended, you know. We don't have a special apparatus.

Q. But there are different kinds of apparatus. Didn't you build it after some special kind of apparatus?

A. Yes, we built the one that we thought was best.

Q. What kind of apparatus?

A. The apparatus consisted of splints, one on each side; on the inside and outside and above and below.

The COURT:

Q. To hold the bones in place?

A. Yes, to hold the broken parts.

Q. Did you ever hear of the Buck or the Davidson or the Henequien apparatus?

A. Some people recommend them but if you take up any book in surgery, they tell you that the best apparatus is the one that you make up at the time of the accident.

Q. Do you think that Mr. Guzman will be—about four or five months from now that he would not be able to work as a bookkeeper

A. He would not be able.

Q. In four or five months do you think he would be able to work as a bookkeeer.

A. I could not tell you.

Q. That fracture after four or five months will prevent him from working as a bookkeeper?

A. The fracture will heal all right but the bone bothers him.

Q. Does it pain him all the time?

A. It does pain him.

51 Q. Will it after four or five months?

A. I could not tell you that. We know the pain is caused by the veins and arteries and the nerves. I couldn't tell you that. It is impossible.

Q. Have you had many other cases of fractures of the thigh bone?

A. Here in Mayaguez we had two at the hospital, but I had quite an experience in the States when I was a student and while I was practicing in the college.

Q. These two cases, did they take that long?

A. More than that too. We had one where we had to amputate the bone; he could not resist the pain.

Mr. MESTRE: That is all.

Witness retires.

52 ANTONIO AMILL NEGRONI, being called as a witness in behalf of plaintiff, was duly sworn and testified as follows:

Direct examination by Mr. CORNWELL:

Q. What is your name?

A. Antonio Amill Negroni.

Q. What is your occupation?

A. Druggist.

Q. Where are you in business? Have you a place of business here in Mayaguez?

A. A drug-store in Mendezvigo Street.

Q. Do you know Felix Guzman?

A. Yes, sir.

Q. Have you been selling him medicines of late?

A. Yes, sir.

Q. (Handing witness a paper.) What is that, Mr. Amiel?

A. That is an account from my drug-store to Mr. Guzman.

Q. Do you know what those medicines were used for?

A. For a fracture of a leg.

Q. What is the amount of that account?

A. $37.81.

Mr. CORNWELL: I offer it in evidence.

Mr. MESTRE: No objection.

(The document in question was then presented in evidence and marked Exhibit C for plaintiff.)

Witness retires.

Mr. MESTRE: I would like to make a motion for an order of the Court allowing my physicians to examine the plaintiff, Mr. Guzman, so that they can testify as experts.

53 The COURT: If you resist it, Mr. Cornwell, I will think it over and pass on it.

Mr. CORNWELL: I would like to consult with my client about it first. If it can be done safely, I will consent to it.

54 EDUARDO FORT, being called as a witness in behalf of plaintiff, was duly sworn and testified as follows:

Direct examination by Mr. CORNWELL:

Q. What is your name?
A. Eduardo Fort.
Q. Where do you reside?
A. In Mayaguez.
Q. Where do you work?
A. In the Bank.
Q. Where were you working on the 4th of November of last year?
A. In the Bank of Porto Rico.
Q. Do you remember any special occurrence that happened on the night of the 4th of November of last year?
A. Yes, sir.
Q. Did you work that night?
A. Yes, sir.
Q. What hour did you leave the Bank?
A. Between 12 and 1.
Q. Where did you go?
A. We left the Bank and we went to the confectionery's.
Q. Who was with you?
A. Felix Guzman.
Q. Well, after you left the Café where did you go?
A. We left and we walked through Candelaria Street.

Mr. CORNWELL: That is understood to be McKinley Street.

Q. Well, what happened?
A. In passing through that street, in taking the sidewalk where the firemen's station is, in passing by that house the eave fell down.

55 Q. Well, anybody injured?
A. Yes, sir. Felix Guzman.

The COURT: Now, tell how it happened. Go on and tell loudly and slowly, so that the jury can hear it.

A. We left the Café. He was going towards his house, with the intention of going towards his house. In passing by that house suddenly we heard a noise as of the weight breaking, and then I, by instinct, jumped out to the street, and then we heard a terrible noise and when I looked I saw the dust in the air and after a few minutes I heard some screams and he called: "Eduardo! Come here!" And then I approached and saw Felix, that he had fallen down. I tried to take him up and he told me that it was impossible and surely I saw that he had a rafter upon his leg and then I cried for help and then from the agency of Panzadi somebody came out and they helped me to take him out from there, together with the policeman and the firemen, and we took him to the Dispensary.

Mr. CORNWELL: Does the eave of that building extend over the sidewalk?

A. Yes, sir. It projects over the sidewalk.

The COURT: Were you both on the sidewalk when it fell?

A. Yes, sir. I was on the outside.
Q. How did you happen to get away and not get hurt?
A. I cannot state. I heard the noise and jumped off.
Q. Did you jump very quick?
A. Yes, sir; so quickly that I fell down.
Mr. CORNWELL: You got some of the mortar and dust over you, didn't you?
A. Some dust; not any mortar.
Q. You barely got away?
A. Yes, sir.
56 Q. A very narrow escape it was?
Mr. MESTRE: I object to that as leading.
The COURT: The objection is sustained.
Mr. CORNWELL: That is all.

Cross-examination by Mr. MESTRE:

Q. How long did you stay in the Café that night?
A. I cannot state the time; until we had our supper.
Q. Did you have any wine with your supper?
A. I do not remember; I cannot state.
Q. Do you remember whether Mr. Guzman had any other kind of liquor?
A. I do not remember.
Q. But you remember that you had some supper.
A. We had some rice with chicken.
Q. Did you have some water?
A. Yes, sir; they always serve water there.
Q. Do you know whether Mr. Guzman is deaf?
A. I do not know.
Q. But you heard the noise and jumped back?
A. Yes, sir. I heard some noise of timbers, and jumped.
Q. Did any part of that eave fall out of the sidewalk, outside?
A. I cannot state; I did not pay any attention. I saw that the center rafter, the middle rafter, had fallen over the sidewalk.
Q. How wide is the sidewalk?
Mr. CORNWELL: I object to that. He can get the actual measurement if he wants it. I have a plan here which I will introduce at the proper time.
57 The COURT: The objection is overruled.
Q. How wide is that sidewalk?
A. I think about a meter and a half.
Mr. CORNWELL: It does not make any difference.
The COURT: I think you are right on that. I will instruct on it. He may show how wide it was to show how far he had to jump to get out of the way.
Q. How far into the sidewalk does those eaves go?
The COURT: If you know.
A. I have not paid any attention before to that eave.
Mr. MESTRE: More or less.

Mr. CORNWELL: What is the use of wasting time with this witness? He has not made any measurements.

Q. So that you heard the noise and got away?
A. Yes.
Q. And all you got was a little dust?
A. Yes sir. I think so, because I found some dust on my clothes.
Q. Was you standing there or was you walking along the street?
A. We were walking.

The COURT: Were you side by side, walking along under the eaves together?
A. Yes, sir. He was on the inside and I on the outside.
Mr. MESTRE: Did you go to the house with Guzman after the accident?
A. Yes, sir.
Q. Do you remember who took him in the cot, in the hammock, in the seretcher.
A. Several people, his brother-in-law, and I was on the side.
Q. Do you remember any of the people who were there?
A. Where?
58 Q. From the Dispensary to his house?
A. His brother-in-law is the only person I remember.
Q. How many persons were there?
A. Four, and some behind.

Mr. MESTRE: That is all.
Witness retires.

59 AMELIA BAURI, being called as a witness in behalf of plaintiff, was duly sworn and testified as follows:

Direct examination by Mr. CORNWELL:

Q. What is your name?
A. Amelia Bauri.
Q. Are you married?
A. Yes, sir.
Q. With whom?
A. With Mr. Felix Guzman.
Q. On the night of the last 4th of November, did anything special happen?
A. Yes, sir.
Q. What was it?
A. While being in bed waiting for my husband, who worked in the Bank, they knocked at the door and thinking he was there I called him and they told me that it was not Felix, and then I asked him what happened, what was the matter, and he told me that my husband had suffered an accident, and I asked what was the matter and where he was, to go and see him or to go for him, and then he told me that he was being attended to or being cured, and surprised, by surprise, I received the news that a house had fallen on him and that he was at the Dispensary. It is useless to say the impression, the shock that I received. I think that I lost my mind.

Q. How you felt we do not want to know. When did they bring your husband home?

A. The time I cannot state, but I believe, or think it was, between 1 and half past one.

Q. What was your husband's condition?

A. In a stretcher, half naked, full of dressings.

60 Q. Was he suffering?

A. Very much; he groaned very much; complained.

Q. How long did he suffer?

A. All the time; all the time complaining.

Q. Does he still suffer now?

A. Yes, sir. He sleeps very little during the night.

Q. Who nursed him and attended to him as nurse?

A. Dr. Giménez.

Q. Who took care of him, not medical attention?

A. With his family, his wife and children.

Q. How is he in regard to his general health, now as compared with before? The general health?

A. He has improved a little now. He does not suffer so much now, but he has always some pain, no relief. He always suffers pain.

Q. How long was he confined to his bed?

A. For two months and a half, and now he is almost all the time in bed, he is only a few hours out of bed.

Mr. CORNWELL: That is all.

No cross-examination.

Witness retires.

61 ADELA GUZMAN, being called as a witness in behalf of the plaintiff, was duly sworn and testified as follows:

Direct examination by Mr. CORNWELL:

Q. What is your name?

A. Adela Guzman.

Q. Where do you live?

A. I?

Q. Yes.

A. Right here in Mayaguez.

Q. Were you living here last November?

A. Yes.

Q. Do you remember an accident that occurred to your father then?

A. Yes; he was brought home about half past one in a cot. We were surprised at the sight because we did not know anything about it.

Q. What is the condition of your father? Does he suffer much?

A. He suffers very much. He never sleeps; he always suffers pain. He has been lying in a cot about two months, and afterwards in a chair. He cannot move alone.

Q. Who attended to him, and nursed him; you and your mother?

A. Yes.

Mr. CORNWELL: That is all.
No cross-examination.
Witness retires.
(Court adjourns to 8 P. M.)

62 8 P. M., FEBRUARY 26TH, 1908.

Stipulation.

We, the counsel in the above entitled cause, owing to the fact that one of the jurors, Mr. Hipolito Cuevas, has been taken suddenly ill and cannot attend, at the request of the Court, hereby agree that the cause may proceed and be tried by 11 jurors, with the same effect as though 12 jurors were present, and their verdict shall be received in the premises.

(By agreement of counsel, the Doctor appointed by the Court to examine the plaintiff, is called at this time out of order.)

JOAQUIN MARTINEZ GUASP, being called as a witness, was duly sworn and testified as follows:

The COURT: Doctor, since the adjournment of court, the Court had you appointed and sent out to examine this plaintiff, to see what his present condition is, and you are not a witness for the defendant or the plaintiff but you are the Court's officer, and the Court expects your testimony to be for the Court, without reference to either of the parties, and with that view testify.

Mr. CORNWELL: I would like to have it appear that he was brought in by agreement of counsel.

63 The COURT: Yes, counsel agreed that the Court should send out such a man, and they agreed that his evidence should be considered as correct.

(MEMO.—Above words from "and they agreed" to end of sentence and word "correct" were added by the Court June 1st 1908, on its attention being called to this omission, and they are ordered to be made a part of the record to which action counsel for defendants objected and duly excepted.—B. S. RODEY, *Judge*.)

Direct examination by Mr. MESTRE:

Q. What is your name?
A. Joaquin Martínez.
Q. What is your age?
A. 45 years.
Q. What is your occupation?
A. Physician and surgeon.
Q. How many years of practice have you had?
A. 20 years.

The COURT: Find out where he graduated.

Q. Where did you graduate.
A. The University of Seville in Spain.

Q. Did you examine Felix Guzman?

A. Yes, sir.

The COURT: Doctor, you have examined this plaintiff within an hour or two, have you not?

A. About an hour, more or less.

Q. Tell the jury in your own way, quickly and loudly, just what you found his condition to be at the present time.

A. This evening, after having been appointed, I went to the house of Mr. Guzman. After having stripped him of his clothes conveniently, I observed in the first place, that the right leg is somewhat crooked and somewhat inclined towards the in-
64 side. It is short something more than two inches. Afterwards, upon examination of the leg I have been able to observe that from the knee to the thigh there is a strong inclination towards the inside. I noted some deformity, which is shown by a convexity, well pronounced to the exterior side. In the inferior third of the leg I observed some hardness of some extent, which seems to be the hardened part of a healed fracture, the joining of the fracture. In the superior third is observed also another hardened part, not so evident but which is the cause of the deformity of the leg in that place, the bone forming there a curvature external of such an extent, which is, to my understanding, the cause of the shortening of the whole limb. Therefore, that is to say, that there have been two fractures, one fracture, the inferior, has been entirely healed, the other or superior, has suffered some abnormal consolidations, producing a deformity in the limb, which of course will be permanent.

Q. What do you find the man's health, as a result of this injury, to be?

A. His general condition is satisfactory, because although the patient has complained to me of some troubles, I cannot make mention of them because they are things which he says he feels but I cannot ascertain whether he feels them or not.

The COURT: Proceed, Mr. Mestre.

Mr. MESTRE: Those troubles that he has told you that he suffers, you cannot appreciate whether he has them or not?

The COURT: He has so stated; that the man says so but
65 those are within the man's own knowledge.

Q. Do you think in all other respects he is a well man today?

A. His general condition is well, although it might happen that that same deformity might cause pain, more or less intense, by compression of the nerves of that region.

Q. Do you think he can walk today?

A. Today? No.

Q. Why?

A. The leg in the first place is shorter than the other one, and in the second place they have changed to a certain extent their position and because they are strongly compressed by that bone, which is not yet in its place, he cannot well use it until it heals.

Q. I do not mean that he can walk as well as I can, or you can, but he can walk from one place to another?

A. Now, in this moment, he would not be able under any circumstances to walk unless it would be like children walking on one foot. He cannot use that leg for the present for anything.

The COURT: You mean to say, Doctor, that he cannot lift his leg for the walking motion, the same as he could if it was not shortened?

A. No, sir. He cannot.

Mr. MESTRE: How long do you think that condition will last?

A. I cannot estimate that. It might be that that will be permanent for life, but if he were a younger person, I might almost assure, with good hopes, he might be able to use *some* his legs but at the age of 45 years it is very difficult. He will never be able to
66 use that leg as the other.

The COURT: Did the fact that there were two fractures render the chances great that this was the condition that must result from it? Because there were two fractures, is this the natural result?

A. Yes, sir.

Q. Then, the chances are that he was treated properly and as well as he could be?

A. I could not formulate an exact opinion in that. It would be necessary for me to have a memorandum of the physicians who attended him and then I could know if something was left that he did not do.

Mr. CORNWELL: I am perfectly willing to have Dr. Giménez called here and explain to him what he did.

The COURT: I don't believe that is necessary

Mr. MESTRE: Do you think, doctor, if he had been attended properly, it would have had that result?

A. If it had been only a fracture of the inferior third, of course, upon being left a cripple a great part of the blame could be laid on the part of the physician who attended him; it is certain that a person who has an ordinary fracture and who is treated by a physician and is left crippled or lame. But in the case of a fracture of the superior third of the femur, almost in the neck of the bone, in the vicinity of the joint, then I cannot state that he has been left crippled because the doctors had not given him the proper treatment, because such fractures are of such a difficult character that every day new methods are invented for the treatment of these fractures
67 on account of the great number of persons who are left crippled.

Q. Do you know of any method to cure that condition?

A. That depends on the class of fractures. In order to understand that, I would have to give a course of anatomy here.

The COURT: Doctor, because there was a fracture immediately above the knee, did not that fact prevent the physicians that attended him from stretching the leg to prevent it from shortening, to put a weight on the leg as is customary?

A. If it had been only one fracture, the weight laid on the leg would be perfectly indicated but in the case of a double fracture, the

weight put on the leg makes the contraction of the inferior but never the superior one.

Mr. MESTRE: Do you know of the Heinicke method for the treatment of a fracture?

A. No, I do not know it.

Q. So that you think that due to the fact of the two fractures they could not apply the tension to make the leg straight?

(Not answered.)

Q. How many different kinds of fracture can the lower part of the thigh have?

(Not answered.)

The COURT: Ask him if he knows what kind of a fracture that lower fracture was; a fracture straight across or oblique?

68 A. I cannot state that now. I can only see the hardened part of the fracture now.

Mr. MESTRE: That is all.

No cross-examination.

Witness retires.

69 ALONSO AGUILAR, being called as a witness in behalf of plaintiff, was duly sworn and testified as follows:

Direct examination by Mr. CORNWELL:

Q. What is your name?

A. Alonso Aguilar.

Q. Where do you reside, Mr. Aguilar?

A. Mayaguez.

Q. What is your business?

A. Surveyor and Inspector of Public Works.

Q. In the month of November of the year last passed did you make a plan of a building up here on Besora and McKinley Street, that was partly fallen down?

A. Yes, sir.

Q. (Showing plan to witness) Did you make that plan?

A. Yes, sir.

Q. Is that a correct plan of that building?

A. Yes, sir. I think so.

(The plan in question was then marked D for plaintiff, for identification. A. J. H.)

The COURT: Do you offer it?

Mr. CORNWELL: Yes, sir.

The COURT: That will be admitted only for the purpose of illustrating the witness' testimony, to illustrate what he was say-

70 ing. That is the rule.

Mr. CORNWELL: Or any other witness?

The COURT: Yes, of course.

(The plan in question was then admitted in evidence, the same not being objected to by defendant, and was marked Exhibit D for plaintiff.)

Q. When did you examine that building?
A. On the 9th of November.
Q. Of last year?
A. Yes.
Q. What part of the building had fallen down?
A. The front. About two thirds part in front.

The COURT: More than the eaves? The whole front of the building fell out, did it?

A. No, just the part which covered the sidewalk.
Q. Over the sidewalk?
A. Yes.
Q. That is, the roof that ran out?
A. Yes.

The COURT: I suggest that you let the witness stand up in front of the jury and explain it to them.
(Witness explains the plan to the jury.)

71 Q. Please explain to the jury what part of the building had fallen down.

A. It was about this part, starting from this door (indicating from the third door from the left clear to the right of the map).
Q. Now, what was that part of the roof that fell down covered with?
A. Well, the part covering the sidewalk.
Q. Extending over the public sidewalk.
A. Yes.
The COURT: What was the material it was covered with?
A. This part (indicating) was concrete.
Q. How thick or heavy was it?
A. It was about two inches.
Q. How far did it extend over the sidewalk.
A. It was about five feet.
Q. Did it cover the whole sidewalk then?
A. Not the whole, but part of it.
Q. Is that the section of the building upon the left-hand corner of the map?
A. Yes.
Q. Showing the corner of the roof?
A. Yes.
Mr. CORNWELL: What was the condition of the timbers that supported the roof?
A. The day I examined the house it was in very bad condition.
Q. What was the condition of the supports that were holding up that eave when you examined them on the 9th of November:

72 the rafters that supported that part of the roof hanging over the sidewalk?

A. The rafter in front was bent; was misplaced.
Q. What was the condition of the wood?
A. It was bad.
Q. Rotten?
A. Yes.

Q. What was the general condition of that building?
A. Awful bad condition.
The COURT: About how much weight of cement fell down, when it fell, if you could tell?
A. Exactly I cannot say the weight of the cement that had fallen down, but a few hundred pounds.
Q. You could judge from what remained?
A. Yes.
Mr. CORNWELL: What was the condition of the wood where these supports joined the building (referring to the plan)?
A. All this part was rotten, decayed. I saw only these two or three hanging from the wall (indicating brackets shown on the map under the eaves, the three center brackets).
Q. What was the condition of the top of the building where this projecting roof joined the regular roof; what was the condition there?
A. The same condition.
Q. All rotten?
A. All rotten.
73 Q. What was the condition of the whole building?
A. The whole building was in bad condition, bad condition.
Q. And you could see that by simply an ocular inspection?
The COURT: Do not lead the witness.
Q. The general appearance of the building, could you observe is simply by an ocular inspection, could you see the condition of the building by just looking at it?
A. Yes, sir. Yes, sir.
Mr. CORNWELL: I think that is all.

Cross-examination by Mr. MESTRE:

Q. Did you see the house before the falling of the eaves?
A. I was crossing there many times; I saw the house.
Q. Did you appreciate the bad condition before the falling of the eaves?
A. Oh, no, I cannot say so.
Q. After the day you made that plan, did you go in the house?
A. Yes, sir. I was there.
Q. The day you made that plan?
A. Yes, sir.
Q. Were the doors of the house open?
A. It was open, yes.
Q. Everything?
A. Yes.
Q. You have said that the eaves were about 5 ft. long?
A. Yes.
Q. Did you measure them?
74 A. Yes, I measured them.
Q. What did you measure, the part that fell down or the part that was up?

A. The part that was standing.
Q. The part that was standing?
A. Yes.
Q. Did you get up there?
A. Yes, sir.
Q. How did you get up there; with a ladder?
A. Yes.
Q. And did the house have a fence around, that day?
A. No.

The COURT: Does the sidewalk run right along up against the house?

A. Yes.
Q. A public sidewalk?
A. Yes.
Q. No space between that and the house?
A. No, sir; nothing.

Mr. MESTRE: What is your profession?

A. Surveyor.
Q. Surveyor of land?
A. Land surveyor.
Q. Do you have a diploma?
A. Yes, sir.
Q. Are you a constructor, too?
A. Yes, constructor. I am Inspector for Public Works, now.

75 Mr. MESTRE: That is all.
Witness retires.

76 MARIANO RIERA PALMER, being called as a witness in behalf of plaintiff, was duly sworn and testified as follows:

Direct examination by Mr. CORNWELL:

Q. What is your name?
A. Mariano Riera Palmer.
Q. What is your occupation, Mr. Palmer?
A. Alcalde of the City of Mayaguez.
Q. No, your profession?
A. Notary.
Q. You are a lawyer, are you not?
A. Lawyer and notary.
Q. What official position, if any, do you occupy?
A. Alcalde.
Q. Were you Mayor on the 4th of November of last year?
A. Yes, sir.
Q. On the 5th of November did you have occasion to visit a building, part of which had fallen down, on the corner of McKinley and Besora Street?
A. I cannot state the date, but I know that I inspected the building.

The COURT: Was it immediately after a piece of the eave had fallen down?

A. The next day.

Mr. CORNWELL: In your official capacity, did you issue any order about that building?

77 A. After the falling of the eave.

Q. (Handing the witness a paper.) Will you read that and see if it is a certified copy of the order you issued; read it yourself, I do not mean to the jury.

A. My signature is there; it is the same one.

Mr. CORNWELL: I offer an order from the Mayor ordering the rest of the building torn down.

The COURT: Question him on that.

Q. Why did you make this order, Mr. Mariano.

A. Upon being notified that the house had fallen I immediately went over there and after I had spoken with the Assistant of Public Works, I decided to use a power which exists in accordance with an ordinance of the municipality, to order the house torn down, to avoid disasters, in view of the accident which occurred the previous night.

The COURT: Well, did you and this other official examine the building to see what caused the accident the night before; whether it was the condition of the building or not?

A. Yes, we visited the place in the company of Mr. Herencia.

Q. The owner?

A. The owner.

Q. What did you find its condition? What caused you to order it torn down?

A. What happened: the falling of the eave and the appearance of the structure.

Q. Now, the appearance is what we would like to know. What was the appearance of it?

78 A. It was in a ruinous condition.

Mr. CORNWELL: Will Your Honor now allow this certificate to go in?

The COURT: Yes, there is no objection, and he has explained it. Let it be read.

(The interpreter reads the document in question to the jury, first in Spanish and then in English, and it was then marked Exhibit E for plaintiff.)

Mr. MESTRE: I object to the admission of this evidence.

The COURT: It is only admitted to show the fact.

(Counsel for both sides agree that this document may be stricken out.)

Q. This letter was after the falling of the eaves, was it not?

A. Yes, sir.

Q. Did Mr. Herencia have any objection to the tearing down of the house?

A. I do not remember; I think not.

Q. Did he comply with your orders?

A. Yes, sir.

Q. Prior to the falling of the eaves, did you have any occasion to notify Mr. Herencia of the ruinous condition of the house?

Mr. CORNWELL: I object to that.

The COURT: I understand that would not be any defense, but the question may be answered.

Q. Prior to that date, did you have occasion to notify Mr. Herencia of the ruinous state or condition of the house?

79 A. No, sir, because before the accident it was not observed that the house was in a ruinous condition.

Mr. MESTRE: That is all.

Mr. CORNWELL: When were you appointed Mayor of Mayaguez, Mr. Palmer?

A. On September 19th.

Q. About a month and a half before his accident?

A. Yes, sir.

Mr. CORNWELL: That is all.

The witness retires.

Mr. CORNWELL: That is the plaintiff's case.

80 *Testimony for the Defense.*

SABAS HONORI, being called as a witness on behalf of the defendant, was duly sworn and testified as follows:

Direct examination by Mr. MESTRE:

Q. What is your name?

A. Sabas Honori.

Q. Your age?

A. Thirty-three years.

Q. What is your occupation?

A. Now, municipal inspector of public works.

Q. Was you called at that time by Mr. Julian Herencia to certify about the state or condition of one house of his property on McKinley Street?

A. Yes, sir.

Q. Did you look at the house?

A. Yes sir.

The COURT:

Q. Now was this after the fact or before it?

A. After the accident.

Mr. MESTRE:

Q. Where is that house located?

A. On McKinley Street.

Q. McKinley Street and what other street?

A. It is at the corner of McKinley and I don't remember now the name.

Q. Jardines Street?

A. Jardines Street.

Q. What did you find at the examination of this house?

Mr. CORNWELL: How long after the accident. I would like to find out that?

The COURT:

Q. How soon after this accident, if you know when this accident happened?

81 A. The next day.

Q. Well, what condition did you find the house in?

A. The skeleton of the house was in good condition. It had no cover, no roof. The timbers were out. The boards were beginning to fall off, to be taken off.

Mr. MESTRE:

Q. So that they began to tear the house down next day?
A. The next day.
Q. They were taking off the tiles?
A. They were removing the tiles.

The COURT:

Q. Well, did you make any inspection to see how this accident occurred, or what caused it? Did you or not? Answer that.
A. I examined the pieces.
Q. Pieces—pieces of what?
A. The pieces of the building in question.
Q. We are not concerned here in much of it, except those that held up the eaves. How did you find those.
A. They had removed already the eaves. I found the pieces of timber which constituted or made the eaves.
Q. And what was the condition of them?
A. They were in good condition.
Q. How did they happen to break them, in your opinion?
A. Owing to a defect of construction, the pieces did not break.
Q. How did the whole roof happen to fall down then?
A. Owing to defective construction of the eave.
Q. Do you know how long it had been there?
A. I don't know.

The COURT: Proceed.

Mr. MESTRE:

Q. Did you find out that the house was in a ruinous condition?
A. I did not find it.
Q. Did you examine the outside and the inside of the house?

82 A. All.

Q. The different parts of the house?

A. Everything.

Q. Ask him whether his opinion is that the house was in a ruinous condition.

The COURT: That is an opinion that you have not qualified him for. Put the question some other way.

Q. So that you made a due and careful examination of the house?

A. Detailed examination.

Q. Do you think that that house was in any way dangerous?

Mr. CORNWELL: Isn't that calling for an opinion?

The COURT: It does and you have to qualify him for that.

A. It was not in dangerous condition.

Q. What are your duties as municipal inspector of public works?

The COURT: Find out his experience.

Q. Have you had any experience in inspecting houses?

A. Many years, enough.

The COURT:

Q. Well, are you a contractor and builder? Have you built houses?

A. Many.

Mr. MESTRE:

Q. Have you got a diploma?

A. Yes, sir; I have a diploma.

Q. What kind of a diploma?

A. I have not of contractor but of 'agronomo'.

The COURT:

Q. Mr. Witness, when you examined this building, will you kindly tell the jury about the eave part of it, the part that fell down and injured this man? If you have had experience in putting up buildings and examining and knowing the weights that the timbers can bear, tell the jury what caused that building to fall down, if you know. If you don't know, say so.

83 A. Those pieces have been cut diagonally, owing to the grade of the eave, the inclination of the eave, it must necessarily slip one point with the other and that occasioned the falling of the eave.

Q. Why did the eave fall down? Was it because the bracket fell down, the roof broke or the bracket broke? What actually gave way?

A. Owing to the defective cut of the pieces which was not done properly.

Q. Of what pieces, the brackets or the rafters?

A. The rafters.

Q. Well, didn't the rafters stick out from under the main roof?

A. They projected but very little.

Q. This roof or eave stuck out over the whole sidewalk, didn't it?

A. No sir; the part that was imbedded and which formed part of the main body of the building projected.

Q. And you say it was because of the diagonal cut of the rafters that they failed to sustain the weight of the roof.

A. Yes, because that was not the proper cut for the construction of that eave. There are different cuts.

Mr. MESTRE:

Q. Do you think that the excessive rain of those days had anything to do with the falling of those eaves?

Mr. CORNWELL: It does not make any difference whether it did or not. He has got to construct a building so that it will withstand the rain.

The COURT: He may ask that question.

Mr. CORNWELL: Note an exception.

Q. Do you think that the rain had anything to do with the falling of those eaves?

84 A. Much.

Q. Did it rain much during those days?

A. During that time it rained heavily.

Q. What was these eaves made of?

A. Of native timber.

Q. And the upper side, the roof?

A. Also of native timber.

The COURT: Wasn't there cement or tiling there? Which was it?

A. There were some tiles.

Q. Then it was one of these buildings covered with these semicircular tiles?

A. Rectangular tiles—square tiles.

Mr. MESTRE:

Q. Was there any cement on it?

A. No cement or concrete.

Q. Are you sure about that?

A. Sure, only lime and sand.

Q. Did you examine that roof?

A. Yes sir.

Q. How wide was that eave from the house to the sidewalk?

A. 1 meter, 20 centimeters.

Q. By feet can you tell me how much it was?

A. 4 feet.

The COURT:

Q. What length of this eave fell down on the sidewalk, if you know?

A. I don't know what length.

Q. Was it all removed when you got there?

A. The whole eave had been removed.

Q. The whole eave from end to end of the building?

A. It had been torn down already. I saw the pieces on the floor.

85 Mr. MESTRE:

Q. And that was the next day?

A. The next day.

Mr. CORNWELL: I move to strike out his testimony. He says now it was all removed.

The COURT:

Q. How many rafters did you find?
A. All of them.
Q. Where was this diagonal cut in them? Can you explain to the jury in some way better than you have how that was?
A. It joined to the main body of the house.
Q. That is where the eave joined the house?
A. Where the eave was imbedded in the wall of the house.
Q. It was just cut diagonally and one piece nailed to the other?
A. One piece nailed to the other.
Q. And the outer part held up by the bracket?
A. By a bracket.

Mr. MESTRE:

Q. Is your duty as inspector of public works to notify the counsel of the house that it was in ruinous condition?
A. Yes sir.
Q. Did you ever have occasion to notify the counsel about this house?
A. Of this, never.

The COURT:

Q. Did you or not inspect that house a short time before the accident, and if so, how long before?
A. I didn't inspect it before.

Mr. MESTRE: That is all.

Cross-examination by Mr. CORNWELL:

Q. When were you appointed inspector of public works at Mayaguez?
A. On October 22nd.
86 Q. Of this last year?
A. Of this last year.
Q. About twelve or thirteen days before this accident, wasn't it?
A. Yes, about so.
Q. Had you ever occupied such a position as that before?
A. In the Bureau of Public Works in the Department of the Interior.
Q. What were you doing in that department?
A. I have been as Inspector of Bridges and of Roads.
Q. But you never acted as Inspector of Public Buildings before, did you?
A. No, sir.
Q. How long have you lived in Mayaguez?
A. Always.
Q. You were born here, wern't you?
A. Yes sir.

Q. From the time you can earliest remember that house was on that corner, wasn't it?

A. Yes sir.

Q. With that extended roof over the sidewalk?

A. Yes sir.

Q. And you are thirty-three years old, you say, don't you?

A. Yes sir.

Q. Do you think, if it had been defective construction, that that thing would have stood for the last twenty-five years?

The COURT: No don't put that. It is argumentative with the witness. You can ask him the question properly.

Q. How, if the building was defective in construction could it stand for thirty-three years?

A. If it had had other joining it would have lasted longer.

Q. How do you reach that conclusion?

87 A. That bad cut which is not the proper cut; owing to the joint which is not the proper joint.

Q. But all your life you remember that standing there?

A. Yes sir.

Q. And during your life you remember times of many heavy rains, don't you, in Porto Rico—in Mayaguez?

A. Yes.

Q. Much heavier than we had last year?

A. Yes, sir.

Q. How many of those rafters did you examine on the ground?

A. All of those that formed part of the eave, which constituted the eave.

Q. How many? I did not ask you all, I asked you how many?

A. I don't remember the number.

Q. How many was it supported by? Four?

A. More than four.

Q. Where were those rafters when you examined them?

A. In the yard of the house.

Q. How do you know they were the rafters that supported that projection over the street?

A. Because those are the ones used for such work.

Q. But how do you know that those are the ones that were used on that projection?

A. Because they could not belong to any other part of that building.

Q. How did you know that they belonged to that building at all?

A. Because I have seen them before, at other times, when passing by often.

Q. And you could identify them lying out there in the back yard, could you?

A. Yes, sir.

Q. Do you know whether or not a part of that building

88 fell down about four years ago?

A. No sir, I don't remember.

Q. (Referring to plan already introduced in evidence). Taking

this plan here, is that a correct plan of that building? You don't know whether that looks like the building you examined or not, do you?

A. It looks like it, but not that it is the same.

Q. That is the general appearance, though, of the building you examined, is it?

A. It looks like it.

Q. Did the building you examined have this kind of supports?

A. Yes, sir, as there are many others.

Q. Did you examine those supports?

A. Yes, sir.

Q. Now, what kind of wood were they?

A. Native timber.

Q. I know, but what kind of timber?

A. I do not know the class; I know it was native timber.

Q. You didn't make a very minute examination of them, did you?

A. No.

Q. Now the rafters that came up under the roof, that projected over the sidewalk—what kind of wood were they?

A. I don't know what class of timber. I know that they are native timber—very hard.

Q. Did you notice the condition of the walls of the building where these different supports were attached to it?

A. Yes sir, they had not been torn down yet.

Q. What—these supports had not been torn down yet when you examined the building.

A. They had been removed already.

89 Q. You just said that they had not been removed.

A. The ceiling plate, yes, where those brackets are attached. The beams that joined to the brackets also.

Q. What was the condition of those beams?

A. Good; native hard timber.

Q. Now, what was this wall of the building—what kind of timber was that? Was it lumber of the country or foreign lumber?

A. Native timber.

Q. All of the building, the side walls of the building?

A. The sheeting, no.

Q. Were not these timbers that were supporting the roof—were not they attached to this wood of pitch pine?

A. They were nailed to pitch pine boards.

Q. And you remember of their being nailed there for twenty-five years, don't you?

A. They were not nailed to the boards but to the beams that were behind.

Q. These brackets were not attached to the front boards of the building?

A. Yes, sir.

Q. Now, were not those boards pitch pine?

A. Of pitch pine.

Q. And you remember of their being nailed there for twenty-five years at least, don't you?

A. Yes, sir.

Q. I believe you stated that this whole projection over the sidewalk was torn down when you went to examine the building?

A. A part of the eave.

Q. And how much more of the building was torn down?

A. They had started to remove the roof, the tiles.

Q. Do you know the weight of one of those tiles, more or less?

90 A. About three pounds.

Q. And how many tiles, more or less, would it take to cover that *acera*, say it was four feet wide? How long is that building on the McKinley Street front?

A. Twenty-one meters.

Q. How many of those tiles does it take to roof a square meter?

A. Twenty-five.

Q. And there is about seventy-five pounds of weight on every square meter there, is that true?

A. Yes sir, but you have to calculate the mortar.

Q. Were you employed by the department of public works up to the time that you accepted this position in the municipality?

A. I was doing private work.

Q. Don't those tiles weigh about five pounds each?

A. You have asked me, more or less, and I have said more or less.

Q. And then in addition to that, it requires a large amount of cement, doesn't it?

A. Yes, a certain amount of mortar.

Q. How much mortar would you use to each square meter of tiling?

A. I cannot state that now. We do not use so often such a kind of roofing. I cannot estimate.

Q. How do you figure when you are going to tile a roof, how much mortar you need?

A. I have to make the unit price of the work the same. For each work I have to make a unit price, the sand, the lime.

Q. I don't want the price of it, but I want the quantity of it.

The COURT:

Q. How many pounds of mortar would it take to lay those
91 tiles as you saw them there, how many pounds per square yard?

A. I cannot state the amount of mortar for such a construction; that is old style.

Mr. CORNWELL:

Q. Does it use more mortar than the present system, or less?

A. Less. The present system is different, according to the kind of construction, at least with regard to this kind of roofing.

Q. At whose instance did you examine this building?

A. Of Don Julian Herencia.

The COURT:

Q. You mean Mr. Herencia, this defendant?
A. Yes sir.

Mr. CORNWELL:

Q. Now, from your experience, do you think that pitch pine in this country stands for twenty-five years when it is exposed to the weather?
A. Yes sir.
Q. That has been your experience in dealing with pitch pine, has it?
A. Yes sir.
Q. And it is in just as good and sound condition as when it was put up?

The COURT: That is argumentative. You have got his statement. Argue to the jury.

Q. Did you notice any part of this projecting part that was decayed?
A. No sir.
Q. It was all perfectly sound, wasn't it?
A. All was perfectly well.
Q. There was not any evidence of decay in any part of it, was there?
A. No sir.
92 Q. Do you know approximately, how old that building was by examining it?
A. No sir.
Q. But ever since you can remember it was there, wasn't it?
A. Yes sir.

Mr. CORNWELL: I don't care to examine him any further.

Redirect examination by Mr. MESTRE:

Q. How long do constructions of native wood last in this country?
A. I don't know the number of years. They last for a long time.
Q. Approximately?
A. That depends.
Q. Over twenty-five years?
A. Oh yes, more I am sure.
Q. Fifty years.
A. Also.
Q. Do you know whether that pitch pine of that house had ever been rebuilt in this house?
A. I don't remember.
Q. You say that the inside parts of the house, the beams, were native wood?
A. All the main beams of the building.
Q. Were they in good state or condition?
A. In good condition.

Mr. MESTRE: That is all.
Witness retires.

93 CRISPIANO RODIL, being called as a witness in behalf of defendant, was duly sworn and testified as follows:

Direct examination by Mr. MESTRE:

Q. What is your name?
A. Crispiano Rodil.
Q. What is your occupation?
A. Carpenter.
Q. Was you ever called by Mr. Julian Herencia to do some work for him?
A. Yes sir.
Q. On what house?
A. On McKinley Street, at the corner of Besora Street.
Q. What kind of work did you do for him?
A. The tearing down of a house.

The COURT:

Q. When; when this house was torn down recently?
A. Yes sir, about the month of November, I think.

Mr. MESTRE:

Q. Do you know of any accident that happened to that house?
A. I heard that an eave had fallen.

The COURT:

Q. Well, was it after that that you were there?
A. Yes sir, in the same morning when the eave had fallen down the previous night.

Mr. MESTRE:

Q. What time did you see that house the next morning?
A. At six o'clock.
Q. When did you engage yourself in the tearing down of the house?

94 A. At the same moment when Mr. Herencia arrived. He commissioned me, or told—entrusted me to do the work, to gather the debris that had fallen to the street and afterwards to start to tear down while the tenants vacated the premises.

Q. Four days after the accident how was this house, was it torn down, or was it standing?
A. Yes sir, it was standing.
Q. All the whole house?
A. Part of it.
Q. The eaves?

Mr. CORNWELL: I object to his leading the witness.

Q. The next morning when you saw the house, did you see the whole eaves down on the ground or was any part standing up?
A. There was some part that had not fallen down.

The COURT:

Q. Well, tell the jury about how many meters long of it had fallen down?

A. More or less, because I did not measure it?

Q. Yes, approximately.

A. The house had approximately twenty meters more or less, and out of that about fourteen of them had fallen.

Q. A little more than half.

A. More than half.

Q. How wide was the eave that had fallen down, if you could see from what remained?

A. Between sixty-five and eighty centimeters.

Q. How much is that in feet?

A. This is four feet (indicating on the rule which the witness holds in his hand).

Q. Now, how much is sixty-five centimeters on this? (Referring to the same rule).

A. (Witness indicates on the rule).

95 Q. About that width fell down?

A. This was the width of the eave.

Q. And twenty meters in length of that fell down or fourteen.

A. Yes, fourteen.

Q. Well, now, Mr. Carpenter, could you judge about how much that weighed; what weight was on that part that fell down?

A. It was covered with tiles from Valencia, Valencian tiles, each of them being ten or twelve inches long and six in width.

Q. How thick were they?

A. Three-quarters of an inch thick, and about three pounds or four pounds each without being wet. After being wet they have more weight.

Q. How many of those went to a square meter?

A. I don't know it.

Q. How much did they overlap each other?

A. They overlapped one inch.

Q. On each end?

A. No, on the inferior end; the one below overlaps one inch on the other.

Q. Were they set in mortar?

A. Yes, with mortar; laid in mortar.

Q. Well, could you make any estimate of how many pounds per square meter was on that part that fell, counting timber and tiles and everything?

A. I could calculate or estimate it, but not now by memory.

The COURT: The Jury can calculate it. There are lots of mathematicians among them, no doubt.

Mr. MESTRE:

Q. Was there any cement on those eaves?

A. The necessary amount to join the two tiles.

96 The COURT: Tell the jury what, in your opinion, if you could judge from appearances there; what caused that eave to fall?

A. The heavy rains of the night and the previous day.
Q. You tore the house down, didn't you?
A. Yes sir.

Mr. MESTRE:

Q. In what condition was that house?
A. It had some small damages.
Q. Was it in a ruinous, dangerous condition?

The COURT: That is a hard question and it would not bring any information to the mind of the jury.

A. No sir.
Q. Was the wood in the eaves of that house rotten?
A. No sir.
Q. Do you think that the falling of the eaves was due to the rain and not to the ruinous condition of the house?
A. They had enough strength to support.
The COURT: Did you examine the brackets that held them up?
A. Yes sir.
Q. Well, were they broken?
A. On the inferior side they fell in splints because they were imbedded in the scantlings.
Q. Were they rotten?
A. No sir.
Mr. MESTRE: Four days after the falling down of the eaves was the eaves yet standing up?
A. The part that had not fallen down was there.
The COURT: How did the rafters that stick down under the *the* tiling—how did they break off from the main roof?
A. The nails were broken because they were nailed to both
97 plates with a nail.
Q. Were the nails sound or rotten?
A. The nails were in good condition. Square nails.

Mr. MESTRE:

Q. Do you know Mr. Alonzo Aguilar?
A. I don't know who he is.
Q. Was anybody looking around the house or making an examination of the house when you were tearing it down?
A. I didn't see anybody.
Q. Was you in charge of the tearing down of that house until you tore it all down?
A. Yes sir. Since I started until it was finished.

Mr. MESTRE: That is about all.

Cross-examination by Mr. CORNWELL:

Q. How long have you resided in Mayaguez?
A. Seventeen years.
Q. Had you ever been to Mayaguez before that time?
A. Many times. I lived in Cabo Rojo.

Q. How old is that house?
A. It is said that it is sixty years old; since the year 41.
Q. You remember it all your life, don't you?
A. Since I lived I remember that house.
Q. And that same extension existed over the sidewalk always, didn't it?
A. Yes sir, the same.
Q. Now you said that the heavy rains caused that to fall.
A. I cannot state any other thing.
Q. Why do you say that the heavy rains caused it?
A. It was the only extraordinary cause which must have caused it.
Q. Wasn't that roof built on a big incline?
98 The COURT: Pretty steep?
A. It had enough incline.
Mr. CORNWELL: And the top of it was covered with these tiles, wasn't it?
A. With those tiles.
Q. And the water that fell on it ran right off, didn't it?
A. Yes sir.
Q. Well, in what way then could the rain affect it?
A. The earthen tile absorbs the water.
Q. It has been doing that for the last sixty years, hasn't it? When it rains?
A. Yes sir.
Q. And when it absorbs so much it does not absorb any more, does it?
A. During the sun it evaporates.
Q. That roof has been full of water for many years, hasn't it?
A. Yes.
Q. It doesn't hold any more water one time than another?
A. According if the showers are more or less heavy.
Q. You say that is the only thing. How could the rain have caused it to fall?
A. I explained it in my judgment.
Q. But how do you reach that judgment? What reasons do you base it on?
A. There was not any other action that would cause the falling down.
Q. What makes you think it was fuerza mayor?
A. They had to tear it down with big iron bars or axes or a big cyclone.
Q. What makes you think that fuerza mayor intervened in the falling of that roof on the sidewalk? What did it have to do with it?
99 A. Because of the weight that was laid on the timbers. They refused to support that weight any longer.
Q. Why did it refuse now. Was it not because the building was getting old?
A. That was part of the cause also.
Q. You have been working all your life as a carpenter?

A. Yes sir.

Q. What is the life of the pitch pine wood here where it is exposed to the weather?

A. That depends upon the class.

Q. I mean pitch pine.

A. There is a pitch pine that rots after a year, and there is another one that will last a hundred years and over that.

Q. Pitch pine?

A. Yes sir. The one that has some gum inside.

Q. That is when it is exposed to the weather?

A. If it has some rosin it will last longer.

Q. Isn't there a little animal here that also attacks pitch pine; polilla?

A. When it is white; when it has some white parts.

Q. And the comejen—doesn't that attack pitch pine?

A. Yes sir, when it is white.

Q. It doesn't attack it when it is yellow?

A. If it is this kind (referring to the wood used in the witness box in which the witness is sitting) it does not affect it.

Q. Never attacks it?

A. No sir.

Q. You didn't tear down this building, did you?

A. I myself, with my laborers.

Q. Why did you tear it down?

A. Because its owner paid me for tearing down the building.

100 Q. Did he give you any reason why the building should be torn down?

A. Yes sir, he did. He said that the tenants that lived there did not pay him regularly. He had trouble to collect his rents. That he had not rebuilt that house because the tenants refused to get out of the place.

Q. If the tenants had gotten out of the house he would have rebuilt it, would he?

A. He said so.

Q. He gave that as the reason why the house was being torn down, did he?

A. Yes sir, and by an order of the Mayor which he had received that day.

Q. (Showing the witness the plan already introduced in evidence.) Do you know the house that that is the plan of?

A. It is somewhat similar to the one I tore down.

The COURT: Well, is that about the pitch of the roof of the one you tore down?

A. Yes sir, exactly; the windows and doors.

Mr. CORNWELL: I believe you testified that this projection was sixty-five to eighty centimeters wide, didn't you?

A. Yes, sir, but only approximately.

Q. Now, you saw these brackets here (pointing on the plan)?

A. Yes sir.

Q. Now they were attached to the weather-boarding of the house, weren't they?

A. One or two were fixed, but the others were attached to the scantling, to the up-rights.

Q. No, I don't mean the top, I mean the arm where they were attached to the building. This point right here (pointing
101 on the plan). Take the first one. What was that attached to?

A. The uprights.

The COURT: Ask him if it was mortised in or nailed in.

A. It was mortised and nailed.

Mr. CORNWELL: That was attached, then, to the outer edge, wasn't it, of that projection?

A. To the interior, it came from the inside.

Q. Now where that was attached had it not become decayed?

A. No sir.

Q. It was just as sound as the day it was put up, wasn't it?

A. It broke in splints.

Q. How did it split?

A. On falling down it broke and some splints fell.

Q. I don't exactly understand you. Do you mean that those things split (pointing to the plan)?

A. Yes sir.

Q. What kind of wood was it?

A. Pitch pine.

Q. Oh, they were pitch pine, were they?

A. Yes sir.

Q. You are positive of that?

A. Yes sir, as I am looking to you here.

Q. Well, I am glad to know that. Now along the front of this building on the top of the wall, was a series of rafters running along the wall at the top of it.

A. Small rafters which are nailed to the ceiling plates.

Q. No, I mean a rafter running the long way of the building.

The COURT: That is not a rafter.

102 Q. What kind of wood was that?

A. Pitch pine, and the lower plate of native timber.

Q. Down on the floor it was native timber?

A. Yes sir.

Q. That ceiling plate on which all the weight of the roof rested was pitch pine, wasn't it?

A. Yes sir.

Q. This tiling roof that was on the building proper,—now didn't the weight of that, to some extent, rest upon this projection that is over the street?

A. No sir, and a positive proof is that not a single tile of that fell down, only the roof of the eaves.

Q. The roof remained perfectly intact, did it?

A. As built, left there from nineteen to twenty days after that.

Q. Now this weather-boarding all up and down here (indicating on the plan) what was the condition of it?

A. Perfect.
Q. There was no evidence of decay there?
A. None, they were thick boards of pitch pine.
Q. It was an inch dressed lumber, wasn't it?
A. More than an inch.
Q. An inch and a quarter dressed down to one inch, wasn't it?
A. Yes sir.
Q. Then it was cut down to a point on one side, wasn't it?
A. Yes sir.
Q. Now these scantlings that run this way on the building—rafters, I think you call them——
A. All was in good condition.
Q. Not a bit of decay on them?
A. No sir; 3 by 3.

Q. There is another plate here (indicating on the plan).
103 They were pitch pine, weren't they?
A. Yes sir.

Q. And how was the eave on this projection over the street attached to the house?
A. I told you before that they were nailed with nails.
Q. It was nailed into the pitch pine ceiling plate; wasn't it?
A. Over the ceiling plate.
Q. It was nailed on top to the ceiling plate?
A. Yes sir, as it is done in all constructions.
Q. And that ceiling plate was pitch pine?
A. Pitch pine.

Mr. CORNWELL: That is all.
Witness retires.

The Court adjourns to 9.30 A. M. February 27th, 1908.

104 9:30 A. M., FEBRUARY 27TH, 1908.

MANUEL GRAÑA, being called as a witness in behalf of the defendant, was duly sworn and testified as follows:

Direct examination by Mr. MESTRE:

Q. What is your name, Mr. Graña?
A. Manuel Graña.
Q. What is your occupation; your official occupation?
A. Manager of the Bank of Mayaguez.
Q. What is your age?
A. Forty-five years.
Q. Do you know Mr. Felix Guzman?
A. Yes sir.
Q. Has he ever been employed at the bank?
A. Yes sir.
Q. Do you mean in the bank under your direction; the Spanish Bank?
A. Yes sir.
Q. What kind of employment did he have there?
A. As a temporary assistant in the accounting department.

Q. Who was to fix his salary and pay him, the cashier or you yourself?

A. I fixed the salary and the cashier paid it.

Q. Well, the cashier paid it through your orders?

A. Sure.

Q. And the fixing of the salaries was a matter of your own business and not the cashier?

A. Exclusively.

Q. What was the salary that he earned during the time that he was there?

A. As a temporary employee I paid him $30 a month, but he sometimes worked during the night, and then we paid him another dollar extra during the night.

105 Q. How long did he work there?

A. He began in the month of August until this thing happened to him.

Q. Do you remember whether in November he was working there?

A. I don't remember well but I remember that the night that this accident happened I was in San Juan.

Q. So that he worked from August up to the day that the accident happened?

A. Up to the date that the accident occurred.

Q. Did he ever earn $20 a week at the bank?

A. I don't think so.

Q. In your bank during that time?

A. He has been temporary; he has not been on the pay-roll.

The COURT: What did you say his duties were, Mr. Graña?

A. To make clean copies of the journal of the accounts.

Mr. MESTRE: Then you employed him at about a dollar a day; $30 a month?

A. Yes sir.

Q. Was he doing any work that would require a certain skill, or just fixing up or calculating work?

A. His work required to have some knowledge of bookkeeping.

Q. Is that all?

A. That is all.

Q. So that, during the time that he was working there for you he never earned $20 a week?

A. No, because there the only person who earns $20 a week is the cashier.

Q. Do you know whether he had taken from the bank $140?

A. Unless the cashier has given it from his pocket.

Q. But you have not given him $140 during that time to fix the accounts?

106 Mr. CORNWELL: I think the best evidence of that is the books of the bank.

The COURT: You have got enough on this.

Mr. MESTRE:

Q. According to your knowledge, do you think that he deserved any more pay for the work he could do there?

The COURT: That is immaterial.
Mr. MESTRE: That is all.

Cross-examination by Mr. CORNWELL:

Q. How many nights a month did he work?
A. I cannot state exactly, because all the nights that he worked I did not go to the office. The cashier was there.
Q. Of what country are you a subject?
A. Of Porto Rico.

The COURT: Hold on, that is not material.
Mr. CORNWELL: Note an exception.

Q. How many nights a month did he work?
A. I think he worked between twenty and twenty-two nights each month.
Q. Now Mr. Graña, didn't you state to Mr. Leopoldo Feliu that no salary had ever been fixed for that man; that he was a temporary employee and that you had not fixed it because you were considering whether you would make him a permanent employee or not?
A. I don't remember having said that to Mr. Feliu. I said to Mr. Horton that he earned $40 and that I had in mind if any vacancy should occur to appoint him a permanent employee.
Q. You never made any such statement as that to Mr. Feliu?
A. That I remember, no.
107 Q. And didn't you also tell Mr. Feliu that if he proved satisfactory that you were going to make him a permanent employee of the bank?
A. No, definitely no, because I don't make the appointments. The appointments of the bank are made by the council at San Juan; by the board of directors at San Juan. If it has resulted as a fact that he was an employee who understood his work, I intend to recommend him to be appointed permanently if there was any vacancy for him.
Q. He got $30 a month, you say? And $1 on every night he worked?
A. Yes sir.
Q. How long would it take you to go to the bank and get the data of the number of nights he worked during each month?

The COURT: Mr. Cornwell, that would not carry much information to the jury. They know that if he worked twenty nights a month he got $20 additional. I don't see why you want any more.

A. There are some holidays and some nights that he has not been able to attend for lack of light and you have to deduct that and holidays also.

Mr. CORNWELL: That is all.

Redirect examination by Mr. MESTRE:

Q. Did Mr. Guzman make an application to continue that work after the accident, with you?
A. I think it was Don Paco del Moral who told me.

The COURT: Ask him to answer that question.
A. He did not make any written application.
Mr. MESTRE: He sent somebody to ask him to hold the position.
108 The COURT: This man cannot know that.

The COURT:

Q. Ask him what he told that person who pretended to represent the plaintiff.

Mr. CORNWELL: I object to that. It is going out of the rule of evidence.
The COURT: Then I will hold to the rule. Ask him if he knows the messenger.
Mr. CORNWELL: Note an exception.

Mr. MESTRE:

Q. Do you know Mr. del Moral?
A. Paco del Moral.
Q. Did you tell him anything in regard to this position?
A. When he was taken sick he told me when he recovered if I would employ him again. I told him if I had an opportunity.

Mr. CORNWELL: Will your Honor strike it out?
The COURT: No, I will leave it there.
Mr. CORNWELL: Note an exception.
Witness retires.

109 ADOLFO RUIZ, being called as a witness in behalf of the defendant, was duly sworn and testified as follows:

Direct examination by Mr. MESTRE:

Q. What is your name?
A. Adolfo Ruiz.
Q. What is your occupation?
A. Carpenter and cabinet maker.
Q. How many years practice have you had in this line?
A. Thirty-odd years.
Q. Have you got any shop here in Mayaguez?
A. Yes sir, at Mendez Vigo Street.
Q. How long have you had that shop?
A. Twenty years.
Q. Have you got any experience in the construction of houses?
A. I have worked some.
Q. Have you ever constructed a house?
A. Yes sir. I have built.
Q. One or more?
A. More than one; several.

The COURT:

Q. Well, how many years have you been working as a carpenter and fixing and building houses?

A. Thirty years.
Q. That has been your trade for thirty years?
A. All my life.

The COURT: He has qualified. Proceed.

Mr. MESTRE: Were you ever called by anybody to examine a house?
A. Yes sir.
Q. Do you know a house belonging to Julian Harencia on Candelaria Street?
110 A. Yes sir.
Q. On Candelaria and Besora Street?
A. Yes sir.
Q. Did you make an inspection of that house?
A. Yes sir, I went there.

Mr. CORNWELL: I object to this testimony; to the entire line of testimony of this witness; to each and every question.
The COURT: The objection is overruled.
Mr. CORNWELL: Note an exception.

111 Q. Did you make an examination of that house?
A. Yes, sir.

The COURT:

Q. Was this examination after this accident occurred?

Mr. MESTRE:

Q. When was that examination?
A. During the first days of the month of November.
Q. After the falling of a part of that house?
A. Yes, sir.
Q. How many days afterwards?
A. I cannot state. When I went to that house they had removed already the roof. They were finishing removing the tiles.

The COURT: Now, what do you expect to show, Mr. Mestre?
Mr. MESTRE: The condition of the eaves.
The COURT: Find out if they were there. He said the whole roof was removed.

Mr. MESTRE:

Q. Did you have occasion to examine a part of the eaves that fell down?
A. No, sir.
Q. Or any part of the eaves that were standing up yet?
A. No, sir. They had already disappeared.

The COURT: I don't care what the condition of the rest of the house was.
Mr. CORNWELL: I move now to strike out his testimony.
The COURT: There is no testimony here yet. He has not said anything material.

Mr. MESTRE: I want to ask him about the rainstorms.
Mr. CORNWELL: A house in a country has got to be built so as to withstand ordinary rainstorms.

112 Q. Do you know whether it rained during those days very hard?

Mr. CORNWELL: I object to that as immaterial.
The COURT: The objection is overruled.

Q. Do you remember whether in those days when the falling of the eaves occurred, it rained hard in Mayaguez?

Mr. CORNWELL: It is well known that there is a weather report here at the Agricultural Station. Is not that the best evidence?
The COURT: No, it is good evidence but not the best.
Mr. CORNWELL: Note an exception.

A. Yes, sir. It did rain heavy.

The COURT:

Q. When did it rain hard?
A. The night that the eave fell and the previous day. During all those days it rained hard.
Q. Do you remember that specially, that it rained hard those days?
A. Yes, sir. During those days it rained hard.

Mr. MESTRE:

Q. Do you think that a heavy rain like that would be able to tear down the eaves of a house that is in good condition?

Mr. CORNWELL: I object to that.
The COURT: The objection is overruled.
Mr. CORNWELL: Note an exception.

A. Being in perfect condition; no.
Q. But I mean the conditions might be bad conditions that are not known to the owner of the house.

The COURT: That will not be permitted.

Q. What do you mean by perfect condition. He said if the house was in perfect condition, it would not have fallen.
A. If it had been recently constructed; recently built, and well built.

113 Q. Do you know Valencian tiles that they use in covering houses?

A. I know them little.
Q. Well, from that knowledge that you have of that kind of tiles, do you know whether they absorb the water?
A. I *cannot say that*; I have always roofed with galvanized iron.
Q. You have not seen those tiles?
A. I have seen them but I have never examined them.

Mr. MESTRE: That is all.
No cross examination.

Mr. CORNWELL: I move to strike out his testimony. There isn't one thing in it that bears on this case, from one end to another.

The COURT: I think you are right. What is there in his testimony?

Mr. MESTRE: About the rain that fell.

Mr. CORNWELL: But he was not where the house fell. He has got to connect it up.

The COURT: The evidence may stand. There is nothing in it that can do you any injury. It may stand.

Mr. CORNWELL: Note an exception.

114 Witness retires.

(At this point in the trial the Court read Section 1808 of the Civil Code of Porto Rico, and directed counsel for defendant to carry on his defense along that line, stating that he would instruct the jury on that.)

Mr. MESTRE: Note an exception.

115 EUGENIO CAIMARA, being called as a witness in behalf of defendant, was duly sworn and testified as follows:

Direct examination by Mr. MESTRE:

Q. What is your name?
A. Eugenio Caimara.
Q. What is your age?
A. 39.
Q. What is your occupation?
A. Dentist.
Q. Do you know Julian Herencia?
A. Yes, sir.
Q. Have you lived at the house of Don Julian Herencia, on Candelaria Street?
A. Yes, sir.

The COURT:

Q. Did you live in this house where this accident is said to have occurred?
A. Yes, sir.

Mr. MESTRE:

Q. When did you live there?
A. During the invasion.
Mr. CORNWELL: That is ten years ago.

The COURT:

Q. Did you ever live in it since?
A. Yes, sir.
Q. Well, up to what time.
A. After the cyclone of San Siriaco.

116 Q. Well, the cyclone occurred just after the American occupation. How long is it since you lived in the house?

A. Three years ago.

The COURT: What do you expect to prove by this witness?

Mr. MESTRE: That the eaves fell down at that time and were rebuilt again.

Mr. CORNWELL: Isn't he bound by his defense in the answer?

The COURT: Yes.

Mr. CORNWELL: He has plead *vis major*.

The COURT: Read his answer.

(Thereupon counsel for plaintiff read the answer of the defendant to the Court).

Mr. CORNWELL: It denies each and every allegation in the second paragraph of the complaint and it avers that the house was in a perfect condition. That is his defense solely.

Mr. MESTRE: My contention is that this third paragraph amounts to the general issue of not guilty.

The COURT: I will have to rule with you on that; let you show it if you can, but I will have to give the other side consider-
117 able latitude on that, because you misled them in your pleadings. You may amend your answer now. You will have to take chances as to the latitude I will allow the other side. It is annoying to the Court not to have the pleadings properly made up, but I will allow you to amend them.

Mr. CORNWELL: Note an exception.

Q. How long ago did you leave that house?

A. Three years, more or less.

Q. Can you give a description of the house; a general description?

A. No, not exact.

Mr. CORNWELL: I think the best description of the house would be a plan.

The COURT: Mr. Mestre, it is very necessary to show a description of this house and to show the construction of those eaves and who built them and why they fell down.

Q. By the time of the cyclone, did you say that you lived in that house?

A. Yes, sir.

Q. Do you remember if any part of the eave projecting over the sidewalk fell down during the cyclone?

A. During the cyclone; yes.

Mr. CORNWELL: I object to that as immaterial.

The COURT: The objection is overruled.

118 Mr. CORNWELL: Note an exception.

The COURT:

Q. Now, find out how much of the eave fell down at that time.

A. On Besora Street.

Mr. CORNWELL: That is on another street.

The COURT: That will be stricken out. What is the name of the street this accident occurred on?

Mr. CORNWELL: On McKinley or Candalaria Street.

The COURT:

Q. Did any part of the eave on McKinley or Candalaria Street fall down while you were living there?
A. No, sir.

Mr. CORNWELL: Note an objection and exception to this testimony.

Mr. MESTRE:

Q. During the time you lived in that house, did it need any repairs?

Mr. CORNWELL: I object to that. The house might not need repairs then and might need it later or at the time of the accident.

Q. When was that house repaired while you lived there; about what year? Or was it repaired?
A. No repairs were made.
Q. Well, did it need any repairs? Did they make any kind of repairs?
A. The eave that fell down.

The COURT:

Q. And that was on Besora Street.
A. Yes, sir.
Q. How much eave fell down?

119 Mr. CORNWELL: Your Honor, I don't believe that is in this case.
The COURT: I don't believe it is either.

A. About two meters.

Mr. MESTRE:

Q. Were there any other kind of repairs that you asked Mr. Herencia about?

Mr. CORNWELL: I object to that.
The COURT: Your own client knows when he made the repairs. What is the use of wasting time with this witness?

The COURT:

Q. Were there any other repairs made on any other part of that house while you lived in it?

Mr. CORNWELL: Note an objection and an exception.

A. No, sir.

Mr. CORNWELL: I move to strike out the testimony.
The COURT: I will leave it for the purpose of showing the general condition of the house, if part of the eaves fell down on the other street.

Cross-examination by Mr. CORNWELL:

Q. How long did you live in the house?
A. About three years.
Q. When did you commence to live in the house?
A. During the invasion; during martial law.
120 Q. That was in August, 1898?
A. During the martial law here.
Q. And then you lived in it for three years, you say?
A. Yes, sir.
Q. That is, you lived in it up to 1901?
A. Three years; I don't remember.
Q. If you came there during the invasion, that was in 1898, and you lived there then for three years, then that would be 1901, wouldn't it?
(Not answered.)
Q. You have not lived in that house since those three years, have you?
A. No.
Q. Then you have not lived in the house since 1901?
A. No, sir.
Q. You mean you haven't lived there? I don't understand that reply.

The COURT:

Q. Mr. Witness, can't you answer whether you have lived in that house during the last seven years, or not? Please answer the question. Did you live in that house during the last seven years; six or seven? Can't you answer that question? It seems a simple one.
A. No, sir.

Mr. CORNWELL:

Q. Wasn't that an old house?
A. Yes, it was an old house.
Q. How long have you lived in Mayaguez?
A. I came here when I was two years old.
Q. You remember that house all your life, don't you?
A. I have seen it always.
121 Q. That same acera that extended over Candelaria Street has been there always, hasn't it?
A. I have seen it always.

Witness retires.

122 JUANA LOPEZ, being called as a witness in behalf of defendant, was duly sworn and testified as follows:

Direct examination by Mr. MESTRE:

Q. What is your name?
A. Juana Lopez.
Q. What is your occupation?
A. A seamstress.

Q. Did you know the house in Candelaria Street belonging to Mr. Herencia?
A. Yes, sir.
Q. Did you ever live in that house?
A. Two years.

The COURT:

Q. What years?
A. 1905.
Q. '05 and '06 or '04 and '05?
A. '06 and '07.

Mr. MESTRE:

Q. By the time of the falling of the eaves of that house, was you living in that house?
A. Yes, sir.
Q. On what side of the street, Doctor Besora or Candelaria side?
A. On Candalaria side.
Q. The eaves in front of your door fell down?
A. Yes, sir.
123 Q. Did you have any occasion of noticing that that eave was in bad condition before it fell?
A. No, sir.
Q. Did you ever notice that it needed any repairs; that part of the house.

Mr. CORNWELL: I object to that, because she said she did not notice it; whether it needed repairs or not.

Q. Did you have any children?
A. Yes, sir.
Q. How many?
A. Two.
Q. Did you live there with your children?
A. Yes, sir.
Q. Did you ever call the attention of Mr. Herencia about the bad condition of that house?

Mr. CORNWELL: I object to that.
The COURT: That is not proper.
Mr. MESTRE: I want to show that his attention was not called to it.
The COURT: That does not make any difference.

Q. Were the eaves of that house in front of your door, in bad condition?
A. I don't think it was in bad condition.
Q. Could you see that eave?
A. Yes, sir; it can be seen. It was in sight.
Q. Did you ever notice that it was in bad condition? Did it give any sign?
124 A. No, sir.

Mr. CORNWELL: I think that is calling for an opinion of the witness as an expert.

The COURT: It is, Mr. Mestre, and she may not know any more about the building of houses than a cat knows about a holiday.

Q. Did you find anything wrong about the house?

The COURT:

Q. About the eaves?

Mr. MESTRE:

Q. About the eaves?

A. No, sir. The proof of that is that we lived two years there.

Mr. MESTRE: That is all.

Mr. CORNWELL: I want to make a formal motion to strike out her testimony on the ground that it is contrary to the pleadings.

The COURT: It will be granted and stricken out.

Mr. MESTRE: Note an exception.

Witness retires.

125 CLAUDIO REBOLLO, being called as a witness in behalf of defendant, was duly sworn and testified as follows:

Direct examination by Mr. MESTRE:

Q. What is your name?

A. Claudio Rebollo.

Q. What is your occupation?

A. Mechanic.

Q. Do you know the house of Julian Herencia on Candelaria Street?

A. Yes, sir.

Q. Did you ever live in that house?

A. Yes, sir.

Q. How long?

A. For nearly 3 years.

Q. When?

A. From 1895 to 1897.

Q. 1895 or 1905?

A. From 1905 to 1907.

Q. At the time of the falling of the eaves of that house, was you living there?

A. Yes, sir.

Q. The eaves in the front of your door, did they fall down?

A. Yes, sir.

126 Q. Prior to that date, did you ever notice anything wrong with that eave?

Mr. CORNWELL: Note an objection and an exception.

A. Never. No, sir.

Q. Could you see the eaves?

A. Yes, I have seen it.

The COURT:

Q. Well, did you ever pay any particular attention to it to see what its condition was before it fell?

A. No. Its condition I did not pay any attention to.

Mr. MESTRE:

Q. Do you think there was any danger?

The COURT: Oh, no! You cannot ask that. He said he never paid any particular attention to it.

Mr. CORNWELL: I now move to strike out his testimony.

The COURT: Stricken out. It hasn't any bearing on the case.

Mr. MESTRE: Note an exception.

No cross-examination.

Witness retires.

127 ELISEO FONT, being called as a witness in behalf of defendant, was duly sworn and testified as follows:

Direct examination by Mr. MESTRE:

Q. What is your name, doctor?

A. Eliseo Font.

Q. What is your occupation or profession?

A. Doctor, medical doctor, physician and surgeon.

Q. Where was you graduated?

A. In the University of Madrid.

Q. How long have you practised medicine?

A. 27 years.

Q. Do you know Mr. Felix Guzman?

A. Yes, sir.

Q. Did you ever have any occasion of assisting him in the fracture of a bone?

A. Yes, sir.

Q. When was that and at what time?

A. The night that the accident happened. As I live near his house, I was called to attend him, to give him medical assistance.

Q. Well, did you go there?

128 A. Yes, sir. It might be about 2 o'clock in the morning.

Q. What did you do there?

A. Being there at the house, Dr. Gimenez Nusa came. Between both of us we made an examination of the fracture of the superior part of the thigh. It caused us a good deal of pain to make this examination, because this man was under the influence of a great excitement, which could not permit to make the examination with care. Nevertheless, we arrived at the conclusion that it was a fracture of the superior third of the thigh, under the superior third of the thigh, and another fracture in the inferior third in the shape of a T. It was impossible that same night, owing to the special conditions in which the patient was in those moments, to make the application of any apparatus or make any reduction, for which reason my col-

league, Dr. Gimenez, resolved that the apparatus should be applied the next day and I, thinking that if the apparatus was not applied in those moments, it should not be applied at least for 5 days afterwards, in accordance with the opinions of fractures by Americans & French, and Dr. Henequien. I desisted on my part to attend to the operation withdrawing from the attendance of this man.

Q. Do you know when that apparatus was applied.

A. The apparatus was applied the next day, about 11 or 12 o'clock.

129 Q. Was that a proper treatment to apply the apparatus that time?

Mr. CORNWELL: I don't see the materiality of this.

The COURT: I don't see, unless the purpose is to show that the man is in worse condition than he would otherwise have been on account of malpractice of the other physician.

Mr. CORNWELL: We are down to the pleadings again.

The COURT: Proceed. The objection is overruled.

Q. Do you think it was a proper treatment which was applied?

A. No, from the fact that the apparatus was not applied at the first moment, they should have waited until 4 or 5 days afterwards in accordance with the opinion of the authorities which I have cited.

The COURT:

Q. Have you seen this patient lately?

A. No, sir.

Q. You don't know whether he is in any worse condition than he would have been if your views had been carried out?

A. I cannot answer that question in that way, because the success of the operation not only depends on the time of the application of the apparatus but on the kind of the apparatus.

Q. Do you know the kind of apparatus they applied?

A. I cannot state the class of apparatus. I cannot state it affirmatively, although my colleague, Dr. Gimenez, has stated to me in private conversation——

Mr. CORNWELL: I object to that.

130 The COURT: That is hearsay.

Mr. MESTRE:

Q. Supposing that they applied their own apparatus and not the apparatus of Henequien or any other of the authorities whom you have stated; do you think that his actual state is due to that fact?

A. No, sir.

Mr. CORNWELL: If they are going to use this man for the purpose of showing the effect of the different systems of setting bones, I think they have got to show the result of setting just such fractures.

The COURT: Proceed, and show whether or not, if you can, this man is probably in a different condition, worse one of course, than he would have been if this doctor's treatment had been used.

Q. Supposing that this man has got a leg shorter by about two inches, do you think that might be——

The COURT:

Q. Doctor, this man's leg is now some two inches shorter than the other one. Are you able to say from having seen him on the evening he was injured, if the treatment you recommend had been used, his leg would not have been so shortened?

A. In all of the fractures of the thigh when they occur in the superior third simultaneously with the inferior third, ordinarily they are shortened but this shortening never should exceed one inch.

Q. Even in cases of a double fracture like this?

A. Even in cases of a double fracture, if the apparatus was
131 perfectly applied and above all the most essential part is the constant attendance or supervision on that apparatus which is where the success of the operation lies.

Q. But some shortening is inevitable, is it?

A. Yes, sir. That is inevitable. If the apparatus is well applied and well attended to, it never should exceed one inch.

Mr. MESTRE:

Q. In the cases of fracture how long does it take the patient to be in condition to walk?

A. That cannot be stated, because that depends on the individual conditions and the general conditions. It should be taken into account that the five day period should be followed according to the American authorities.

The JURY: I should like to know if such an apparatus could be obtained here in Mayaguez that night.

The COURT:

Q. Ask him if the apparatus which he recommended that night was obtainable in Mayaguez that night.

A. Some part of it could not be obtained here but it could be made; it could be substituted. I understood that the apparatus was applied very approximately to what was required.

Mr. MESTRE:

Q. But not precisely?

A. No, sir.

132 Q. Where could that apparatus be found?

A. The Henequien apparatus can be made easily: five or six pounds of cotton, two napkins, two ribbons of ten or twelve meters by five centimeters in width, and the splints.

Q. All that could be found or made here?

A. Yes, sir.

The COURT:

Q. Isn't that just what they put on, doctor?

A. I couldn't say because I did not attend him.

Mr. MESTRE:

Q. What apparatus is that you have described?

A. The Henequien.

Q. In cases of fracture, do they generally suffer pain of any kind after five months?

A. Yes, sir.

Q. And how long does it take to cure: more or less to be in a general condition to walk and work?

A. In the present case I must state that it is of special conditions on account of special individual conditions.

Q. What are those special individual conditions?

A. That man is an alcoholic.

Q. Supposing that this man was an ordinary man?

Mr. CORNWELL: I move to strike out that answer.

The COURT: The motion is overruled.

Mr. CORNWELL: Note an exception.

Q. In an ordinary man, how long does it take to cure a case of this kind, of double fracture?

A. Two months.

133 Q. Do you think in two months he can be able to work?

A. Yes, sir.

Q. To teach music or do book-keeping?

A. Yes, sir.

Q. And you spoke about a certain nervous condition of the man the night of the accident?

A. Yes, sir. Through delicacy I didn't want to state the words but if I am compelled to I will state the facts.

Q. What were they?

A. That he was drunk: under the influence of liquor.

Q. Why do you say so?

A. I know it in the first place from the smell that he had and at the same time by the treatment used, which was ammonia.

Q. Did you operate or begin the treatment that same night?

A. No, sir.

Q. For what account?

A. Precisely for that condition in which he was.

Q. What condition?

A. He was drunk.

Mr. MESTRE: That is all.

Cross-examination by Mr. CORNWELL:

Q. Doctor, you made the statement now that a fracture the same as the one in question, could be cured, a double fracture ex-

134 actly the same as the one in question, could be cured in two months?

A. In a man in good condition.

Q. Do you mean by that a man as old as the man in this case?

A. No, sir. I mean to say in good physiological condition, in good health and also adequate age also.

Q. Of what age does he have to be to cure it up in two months?

A. Neither very young nor very old; between 20 and 50 years.
Q. Do you think you could cure a man of 50 years in two months?
A. Yes, sir.
Q. Now, doctor, how many cases of double fracture have you ever set?
A. I have seen nearly 20 cases.
Q. Now, doctor, I want you to enumerate them so I can call them. You have lived in Mayaguez all your life.
A. I refuse to answer that question for the following reasons: Because I have not the memory so clear to remember the cases of 25 years and remember all the cases of the different patients that I have treated.

Mr. CORNWELL: I now move that this testimony is outside of the agreement and should be stricken out.
The COURT: The motion is overruled.
Mr. CORNWELL: I move to strike out all his testimony except as to what he did there that evening.
135 The COURT: Overruled.

Q. Doctor, how long were you Collector of Revenue here?
A. 7 years.
Q. You were then in the employ of the Government, in the Collector's Office, weren't you?
A. Yes, sir.
Q. Now, before that how long were you Mayor of Mayaguez?
A. 1 year.
Q. What other public positions have you occupied?
A. Always physician, and during the performance of those duties I have always practised my profession.
Q. Weren't you a professor in a college at one time?
A. Yes, sir, but that is not incompatible with the practice of my profession.
Q. How long have you been General Agent here of the New York Life Insurance Company?
A. 8 years.

Mr. CORNWELL: That is all.

Witness retires.

136 (Counsel for defendant at this time offered to present the testimony of one Dr. Gonzalez as an expert, which testimony is not allowed by the court and to which ruling of the court counsel for defendant thereupon noted an exception.)

FLORENCIO OUFRE, being called as a witness in behalf of the defendant, was duly sworn and testified as follows:

Direct examination by Mr. MESTRE:

Q. What is your name?
A. Florencio Oufre.
Q. What is your occupation?
A. Carpenter.

Q. Were you ever engaged or called by Mr. Harencia to examine his house on Candelaria and Besora Streets?
A. Yes sir.
Q. When was that?
A. I cannot state the date.
Q. Was it after the falling of the eaves of that house or before?
A. After the falling.
Q. How soon after?
A. I cannot state because I didn't count the days.
Q. Was the house all torn down at that time?
A. No sir, the eave only.
Q. Did you have opportunity to examine the eaves?
A. Yes sir.
Q. When it was standing up or when it had fallen?
A. When it was standing up and after it had fallen?
Q. What is your experience—how long have you been a carpenter?
137 A. All my life.
Q. How old are you?
A. Sixty years.

The COURT:

Q. Have you built lots of houses?
A. Yes sir.

Mr. MESTRE:

Q. What was the condition of those eaves by the time of the falling?
A. It had some damaged parts.
Q. What do you mean by defectos?
A. That it was in bad condition owing to bad repairs that had been made thereon.
Q. What do you mean by bad repairs?
A. That they were not good repairs which were made on account of economy.
Q. It had not been properly repaired?
A. Yes sir.
Q. And the construction was not proper construction?
A. No sir, owing especially to the economies that they wanted to make.

The COURT: I guess you can cross-examine him, Mr. Mestre he is adverse.

Mr. MESTRE:

Q. When were those economies made? Do you know when those repairs were made?
A. Many years ago.
Q. Do you know whether it was Mr. Herencia that made the repairs?
A. No, sir.

Q. Those defects of construction or repairs could be seen from the outside?
A. Yes sir.
Q. Could they be observed by an ordinary person?
A. Yes sir, an intelligent person.
Q. Intelligent in those matters?
A. Yes sir, in those matters.

138 Mr. MESTRE: That is about all.

No cross-examination.
Witness retires.

(Hearing is adjourned to 1:30 P. M. the same day.)

139 1:30 P. M., FEBRUARY 27TH, 1908.

IGNACIO FRASQUERI, being called as a witness in behalf of defendant, was duly sworn and testified as follows:

Direct examination by Mr. MESTRE:

Q. What is your name?
A. Ignacio Frasqueri.
Q. What is your occupation?
A. Assistant Surgeon.
Q. Did you have occasion to attend, to give any medical attendance to Mr. Felix Guzman?

Mr. CORNWELL: I object to that. He is not licensed under the law to practice medicine.

The COURT:

Q. What do you want to prove?

Mr. MESTRE: He is in charge of the emergency hospital here.
The COURT: He can show what he did with the man.

Q. Are you in charge of any hospital?
A. Yes sir.
Q. What is it?
A. Municipal; assistant physician in charge of the dispensary.
Q. What are your duties in the dispensary?
A. When it is my turn in the dispensary, to attend to the wounded who are carried there.
Q. Are you authorized by the law to do that?
A. Yes sir.
Q. Did you ever have occasion to treat Mr. Felix Guzman?
A. Yes sir.
Q. When was that?
A. I don't remember the day, but I know that I attended him one night at about half past one or two in the night.
140 Q. What did you cure him of?
A. I gave him the first cure for a fracture that he had in one leg.
Q. Did you notice anything irregular in his state?

A. Yes sir.

Mr. CORNWELL: Unless they can connect it in some way with this accident, that is not material.

The COURT: That is true, unless it was the proximate cause of this injury it is not material. You can argue the question and I will instruct on it.

Mr. CORNWELL: Note an exception, and to every question on this line.

Q. What did you notice of his condition?

A. When he was carried to the dispensary and he was put on the operating table, he refused to be cured. He was under terrible excitement. We had to call for some others in order to keep him quiet, because it was impossible to cure him, and after a long time we succeeded in putting on him the first apparatus.

The COURT:

Q. Do you know what that was brought on by? Was it by the accident or by intoxication, or what? Could you tell as an assistant physician?

A. I am inclined to believe that it was owing to having drunk something, because he had a smell of having drunk something.

Mr. MESTRE:

Q. From his general appearance, could you tell whether he had been drinking?

The COURT: You cannot tell from his general appearance after being taken out from under a roof. He no doubt looked like a dilapidated man.

Mr. MESTRE:

Q. Did he act like an intoxicated man?

The COURT: You have all the court will permit on that point.

Q. So that you say that the first treatment could not be
141 given to him on account of his state?

A. We could do it and did it, but it caused us trouble to do it, to keep him quiet.

The COURT:

Q. You did effect the cure, but it gave you trouble on account of his condition; was that the fact?

A. Yes sir.

Mr. MESTRE:

Q. Do you think that the trouble that you had in curing him and the time taken had any effect on the cure?

Mr. CORNWELL: That is objected to.

The COURT: The objection is sustained.

Mr. MESTRE: That is all.

Cross-examination by Mr. CORNWELL:

Q. You don't know whether that man was intoxicated or not?
A. His condition which did not make him want to be cured and the smell didn't indicate other things but that.
Q. But you of your own knowledge don't know whether he was intoxicated or not, do you?
A. I cannot guarantee that.
Q. Haven't you seen men excited from being hurt and in a delirious condition from pain?
A. The result of the pain that it causes is that the person groans very much and some times, in order to be able to effect a cure, it is necessary to use anaesthetics and chloroform, but this gentleman not only refused to be cured, but he struck himself in the injured parts with his fist.
Q. Did you ever hear of a disease or condition of a man when he was known to have traumatic delirium?
A. In consequence of the injury suffered?
Q. Yes, sir.
A. Yes, but that man revealed that he was not under such
142 dilirium.
Q. Well, explain what the nature of such a dilirium is.

Mr. MESTRE: I object to that.
The COURT: I do not believe that will throw any light on the issue. I do not think this witness knows what that is. That is not a bit profitable; I don't think I ought to permit that, Mr. Cornwell.

Q. Ask him how a person is affected when he is suffering from traumatic dilirium.
A. Acute pain, and he complains very much and some times he refuses to be cured and fights and wants to strike the persons who are around.

Mr. MESTRE: I object to this examination of the witness as a medical man. He has testified in his opinion that he was drunk.
The COURT: In answer to Mr. Cornwell's question he made an explanation, but that is the extent to which I will permit it.

Q. Now I want to ask you what did this man do?
A. He was laid on the bed or table in the dispensary.

The COURT:

Q. No, how did he act himself?
A. To strike himself on the leg he refused to be cured. He didn't want to be cured. He struck me on the face and struck my spectacles and I afterwards had to call for several people to aid me in curing him.

Mr. CORNWELL: That is all.
Witness retires.

143 JULIAN HERENCIA GOSALBO, being called as a witness in his own behalf, was duly sworn and testified as follows:

Direct examination by Mr. MESTRE:

Q. What is your name?
A. Julian Herencia Gosalbo.
Q. What is your occupation?
A. Property owner.
Q. Your age?
A. Forty-Four years.
Q. You are the defendant in this case?
A. Yes sir.
Q. Are you the owner of the house in Candelaria and McKinley Streets, that fell down, that is the subject of controversy in this case?
A. Yes sir.
Q. When did you buy that house?
A. In April, 1898.
Q. From that time up to now did you ever know by any means of that eave; was it in bad condition?

Mr. CORNWELL: That is objected to. Whether he knew or didn't know is immaterial. The law presumes that he must have known.

The COURT: I will admit this testimony at this time with the right to instruct against it, for fear that I might modify my views somewhat. You may ask the question but I won't agree to let it — to the jury finally.

Q. (Was read by the stenographer).
A. It has not been in bad condition because I have made several repairs of small amount, but never I observed that the eave had anything. It has been so that the same people pass by at all hours, and it was in sight of the public.

144 Mr. CORNWELL: I object to a speech here.

The COURT: Tell him not to make a speech but answer the question.

Q. Did anybody notify you or tell you about the bad condition?

Mr. CORNWELL: I object to that.

The COURT: For you to ask him that negative question won't do.

Q. What do you think caused the falling of that eave?

Mr. CORNWELL: I object to any opinion.

The COURT: He must state if he knows.

Q. Do you know?
A. I think it was owing to the hard rains of the 4th and 5th day.
Q. When you bought that house did you happen to study the construction of the house before buying?
A. I am not an expert carpenter or master carpenter?
Q. What else do you know about this matter?

Mr. CORNWELL: I object to that question because he started in with a speech already.

The COURT: I will see what he starts to say; ask him the question. If he knows anything about the reason of that falling down, he may tell it. Anything apart from what he has already said.

A. No tenant ever notified me of anything; no tenant or neighbor.

Mr. CORNWELL: That wouldn't make any difference. If the city failed to notify him it would only be negligence between him and the city; it would not justify his act.

Q. Did it rain hard that night and the night before?
A. Yes sir, it rained enough.
Q. Do you know of what was made that eave?
A. Of tiles; some earthen tiles.
Q. Valencian tiles?
145 A. I am from Valencia, but I don't know if they are from Valencia, or from New York.
Q. Were the eaves of that house in a ruinous state or in need of repairs?

The COURT: No, find out if he examined them or took pains to look at them.

Q. Did you see your house prior to that falling?
A. Yes sir.
Q. Did you examine it?
A. Every day I looked at it in order to find out if it had any damage or defect to order it repaired.
Q. Were there any defects that required repairs at that time?
A. No sir; nobody gave me notice of any.
Q. Well did you yourself find any?
A. No sir.
Q. Was the house in a ruinous condition?

The COURT: I have ruled that out repeatedly, Mr. Mestre. Ruinous condition would be his opinion. He is your witness. This man is interested. He might think one thing was ruinous and another might not think so.

Q. What was the condition of the house the last time you saw it?
A. It was in habitable condition.
Q. When was the last time you saw it?
A. I saw it an hour or an hour and a half prior to the accident.
Q. And the day before did you see it?
A. Also; when I go out I have to pass by the house.
Q. To pass under that same eave?
A. As all the neighbors of Mayaguez who pass by there.
Q. Was the house inhabited at that time?
A. Yes sir.
Q. All the departments of the house?
A. All of them.

Mr. MESTRE: That is about all.

146 No cross-examination.
Witness retires.

Mr. CORNWELL: For the sake of the record I move to strike out his testimony.

The COURT: No, there is some there that is material. You may save it on the record.

Mr. CORNWELL: That is what I want it for. Save an exception.

The defendant closes his case.

147 *Testimony in Rebuttal.*

Mr. CORNWELL: I first offer in evidence a report of the Weather Bureau as to the climatic conditions at the time of the accident.

The COURT: I will take judicial notice that this is a Government publication and will admit it.

(Counsel for Plaintiff marks material portions of said report.)

Mr. MESTRE: The station where these observations were taken is about a quarter of a mile away from where the house was that fell; a quarter to a half a mile.

The COURT: The paper may be admitted to show rainfall during that month previous to the accident.

(The document in question was then admitted in evidence and marked Exhibit E for plaintiff.)

148 NICHOLAS GIMENEZ being recalled as a witness for plaintiff, testified as follows:

Direct examination by Mr. CORNWELL:

Q. Dr. Gimenez, what was the condition of Felix Guzman, as to whether he was intoxicated or not the night that you attended him?

A. I don't think he was intoxicated that night. I think he was suffering from traumatic delirium, which is very similar to intoxication. I don't think he was intoxicated, because he took chloroform very well and a man intoxicated cannot take chloroform without struggling.

Cross-examination by Mr. MESTRE:

Q. Why did not he take chloroform the same night?

Mr. CORNWELL: I object to it. It is a question whether he gave it to him or not.

The COURT: Let the doctor answer it.

Q. Why didn't he take chloroform that night?

A. Because I have to wait until after the traumatic delirium was over and that is a general rule in surgery. Traumatic de-
149 lirium is only a form of shock and the rule is always to wait until the shock gets over.

Q. Was Dr. Font present at that time?

A. He was not present when I got to the house.

Q. When was he present that night?
A. I don't know. I didn't meet him at that time at the house.
Q. So you had to wait until the traumatic delirium passed, to apply the chloroform?
A. To apply the chloroform.
Q. Then you made a mistake when you said in your direct examination that Dr. Font was there.
A. When did I say so?
Q. In your direct examination.
A. I never said so. I saw Dr. Font the next morning; I don't remember exactly; that was about three months ago—whether he was there.
Q. Did Dr. Font have anything to do with the case at all?
A. No, he examined the case before my arrival but he didn't treat him.
Q. Did you make any statement to Julian Herencia about Mr. Guzman being intoxicated that night.
A. I never made such a statement to Mr. Herencia.
Q. Have you collected your account of Mr. Guzman?
A. I passed my bill but I have not collected my account yet because I am still treating him.

Mr. CORNWELL: That is all.
Witness retires.

150 PEDRO PEREA being recalled as a witness for plaintiff, testified as follows:

Direct examination by Mr. CORNWELL:

Q. Did you see Mr. Felix Guzman on the night of the accident, doctor?
A. Yes, I did.
Q. Was he intoxicated?
A. I saw him about two hours after the accident and he was not intoxicated, as I was talking to him and he explained to me very nicely how the accident happened.
Q. And he showed any indication of being under the influence of liquor?
A. No.
Q. What was his condition?
A. A condition of a man who has suffered a great traumatism; a man that is nervous and worrying about his condition.
Q. But he was not intoxicated?
A. No, sir, not at all.

Mr. CORNWELL: That is all.

Cross-examination by Mr. MESTRE:

Q. You saw him two hours afterwards?
151 A. Yes, sir.
Q. After he was brought to the house?
A. Yes, sir.

Witness retires.

152 AMELIA BAURI, being recalled as a witness for plaintiff, testified as follows:

Direct examination by Mr. CORNWELL:

Q. How long have you been married to Felix Guzman?
A. 18 years.
Q. Mr. Guzman ever drink liquors to any extent?
A. No, sir; never.
Q. On the night they brought him home, was he intoxicated?
A. No, sir, he was sober.
Q. Excepting that he was suffering?
A. That is natural.

Mr. CORNWELL: That is all.

Cross-examination by Mr. MESTRE:

Q. How long was Mr. Guzman in Cuba?
A. Nearly 7 years.
Q. Was he away from you?
A. No, sir. He first went alone and I then joined him.
Q. How long has he been away from you the last time?
A. Three years, the last time.

153 Q. And how long has he been here in Porto Rico since he arrived the last time?
A. About five or six months.
Q. How long had he been here at the time of the accident?
A. About three months; I am not sure of the date.

The COURT: During that three months, did you ever know of his taking anything save an occasional glass of wine or something?
A. Never.

Mr. CORNWELL: That is all.
Witness retires.

154 ADELE GUZMAN, being recalled as a witness for plaintiff, testified as follows:

Direct examination by Mr. CORNWELL:

Q. Did you ever see your father drink liquor?
A. No, sir.
Q. Did you ever see him under the influence of liquor?
A. No, sir.
Q. He is always home in the evenings when he is not working?
A. Yes, sir.

Mr. CORNWELL: That is all.
No cross-examination.
Witness retires.
(The testimony is closed on both sides.)
(The Court rules that the question for the jury is whether the accident was caused by an act of God or whether it was not caused by an act of God, and that that is the only question left open.)

155 *Court's Instructions to the Jury.*

Gentlemen of the Jury: It now becomes the duty of the Court to instruct you as to the law of this case. It is the duty of the jury to take the law from the Court, but you yourselves are the judges of all the facts in the case and of the weight to be given to the evidence of any particular witness. It is hoped, gentlemen, that you fully appreciate the controversies that often arise in the trial of a cause and in the settling of disputed points of law between the Court and counsel, and it is further hoped that no occurrence during the trial in that regard will have any effect on your verdict save as you may be now finally instructed by the Court. Nothing in the mannerisms or remarks of the Court or of counsel on either side should be considered as affecting the rights of the parties to this controversy, because under the law of the land and under the instructions as now here finally given you, the parties are entitled to exactly equal rights as thus assured by the law.

This, gentlemen, is what is known as an action at law for damages which the plaintiff contends he has sustained owing to the negligence of the defendant. In such a case this Court is governed, save in a few instances of general principles of commercial law and a few other subjects, by the local law, if any is in existence on the subject being litigated. In suits in equity the rule is entirely different and this Court is never subject to the local law in regard to its practice.

The class of action we are trying here is one about which much controversy exists in the different States of the Union and in the several civilized countries of the world, but as to us here it is
156 simplified by local laws of Porto Rico and it becomes the Court's duty now to select from the local statutes bearing upon the subject, those which in the opinion of the Court apply. Sec. 396 of the civil code of Porto Rico provides: "When a building, wall, column or any other construction is in danger of falling, the owner shall be obliged to demolish it, or to do whatever is necessary to prevent its falling." And section 398 of that same code provides: "In the cases referred to in the two preceding sections, should a tree or building fall, the owner shall be liable for the damages caused, except in cases of *vis major*." This latter term, gentlemen, means that a defendant is liable except in cases of superior force, that is, the Act of God or some other force for which the owner of the building could not be held liable, as for instance, a stroke of lightning or an earthquake or a runaway team or automobile dashing into a building and throwing it upon people, or a cloudburst or unexpected torrent of rain, or any such occurrence as that, of so unusual or extraordinary a character, as that the same could not be foreseen or provided against by the exercise of ordinary care.

Section 1808 of the same code provides that: "The owner of a building is liable for the damages which may result from the collapse of the whole or a part thereof, if it should occur through the absence of the necessary repairs." You are therefore instructed, gentlemen, that if you believe from a preponderance of the evidence

that this defendant permitted his building to go to decay so that the roof or eave thereof was not sufficiently strong to withstand the ordinary weather to be expected here in this community where
157 it is situated, and that by reason of such fact it fell and injured the plaintiff without any fault upon the part of the plaintiff, then you are instructed that the defendant owner of the building is liable to the plaintiff in compensatory damages in such amount as you may deem proper under the evidence within the amount of twelve thousand dollars which he claims in his complaint.

And in estimating the damages to which you may believe the plaintiff to be entitled as aforesaid, you may take into account his age, his earning capacity and his loss thereof, what he has paid for drugs, medicines and medical attendance, the amount of suffering he has endured and the amount of expense he is liable to be put to in these regards, and the probable duration of the injury and suffering and his loss of earnings by such facts.

You are instructed, gentlemen, that the rule in this sort of a case is different from the rule in criminal cases. In the latter a conviction can take place only when you believe a defendant guilty beyond a reasonable doubt, while in a civil case like this a plaintiff or a defendant can recover on a preponderance of the evidence. But, gentlemen, a preponderance of the evidence does not necessarily mean that you must decide for the party presenting the greater number of witnesses, but it means that you should believe the preponderance to lie on the side which has the more reasonable testimony and upon which it preponderates in your judgment as reasonable men.

You are instructed, gentlemen, that if you believe from a preponderance of the evidence that no *vis major* or superior force took place or happened or no event of that character happened, as herein defined, to cause the injury to this plaintiff, and that this de-
158 fendant did not exercise proper care in and about the keeping of this building of his in repair, then you should find for the plaintiff and assess his damages at such sum within the amount claimed as you may deem proper under these instructions.

You are further instructed, gentlemen, that while it is not negligence *per se* to have the roof of one's building extend over the sidewalk in the way the proofs tend to show this roof to have extended, still the fact that a roof does so extend over the sidewalk, upon which the public have a right to be, imposes upon the owner of the building the exercise of not ordinary but extraordinary care to see that his roof and eave are kept in proper repair to resist all strains that can be put upon it, that a reasonable man under the circumstances would know it would be liable to be subjected to, and the burden is on the defendant to show this, and if you believe from a preponderance of the evidence that this defendant's roof or eave so extended over the sidewalk, and that this plaintiff while being upon the public street or sidwalk beneath the same, was injured by the falling thereof, and that the defendant did not exercise extraordinary care to so keep the same in repair, and that the plaintiff was injured without any fault on his own part and without any contributory neg-

ligence of any sort, and the burden of showing this is on the defendant, then you must find for the plaintiff and assess his damages within the limits heretofore stated.

You are further instructed, gentlemen, that if you believe from a preponderance of the evidence that the defendant exercised extraordinary care to see that his roof and eave were kept in proper repair to resist the ordinary strains that it could be reasonably
159 expected to be subjected to, and that because of an extraordinary strain to which the said roof and eave were put by reason of the sudden and unexpected fall of an extraordinary and unexpected quantity of rain that resulted and was the proximate cause of the said roof or eave collapsing, then the defendant is not liable under the local law and you should find in his favor.

You are instructed, gentlemen, that compensatory damages are what the plaintiff is entitled to recover here, and that while you can consider all of the elements heretofore mentioned in your calculation of his damages, still the evidence in this case does not warrant the infliction of any punitive or smart money damages, because such damages are imposed only in cases where the injury is wilful and malicious. But this instruction is not intended to prevent you from giving such damages within or up to the amount claimed in the complaint, as you may deem proper under all the facts, evidence and circumstances in the case.

You are further instructed, gentlemen, that contributory negligence by a person injured, to avail a defendant against his claim, must have been the proximate cause of the injury, and you are therefore instructed that *unless you believe* from a preponderance of the evidence that this plaintiff was intoxicated on the evening in question in such manner as to affect his judgment, *and that in consequence thereof or for any other reason*, he delayed under the eave or roof in question after he had reason to believe, or would have had such reason were he in his normal condition, that it was about to fall, and at a time when he had plenty of time to get away
160 and prevent the injury, you should find for the plaintiff and assess his damages as heretofore instructed. Otherwise, you should find for the defendant.

You are further instructed, gentlemen, that the fact that this sort of suit may not yet have become common in this community or that it may in fact be the first suit of the kind, is no reason why you should not accord the parties their rights here under the law as now given you by the Court, and the fact that there may be other houses constructed similarly and requiring equally extraordinary care from their owners against injuring the public should cut no figure and have no effect as to your verdict in this case one way or the other.

You are further instructed, gentlemen, that the plaintiff had a perfect right to be on the public sidewalk or street in question at any hour of the day or night and the question of the hour when he was there should not affect your verdict in any way.

You are further instructed, gentlemen, that if you believe any witness has wilfully sworn falsely as to any material fact in the case,

you may disregard the whole or any portion of such witness' evidence unless you believe the same is corroborated by other facts and circumstances in the case.

It is presumed, gentlemen, that you will not permit any outside consideration to affect your verdict in the least. Neither the nationality of the parties nor your acquaintance with them should have any effect or weight in the rendering of your verdict. Were such to take place, justice would become a farce. Neither the parties nor their counsel, now or at any other time, have any right whatsoever to ever question you or your motives for rendering any
161 verdict you may see fit to arrive at under these instructions and the evidence in this case. They are not under oath and you are.

While the Court has no right to, and does not desire to force you to render a verdict in this cause, yet gentlemen, it suggests that these trials are expensive both to the parties and to the Island, and that it is therefore hoped that the jury will weight every fact and circumstance in the cause and arrive at such verdict as they may believe, from a preponderance of the evidence and these instructions, to be proper, but it is not meant by this that any juror should give up his opinion to any other juror unless he shall conclude that it is reasonable for him to do so under the evidence and these instructions, when of course it is not only proper but right that he should, if he so believes.

Two forms of verdict will be given you, gentlemen, one reading: We, the jury, find for the plaintiff and assess his damages at the sum of $—; and the other reading: We, the jury, find for the defendant. When you have arrived at a verdict, you will cause the same to be filled out and signed by one of your number whom you will appoint as foreman for that purpose and then all of you will return the verdict into court, and discard the other form of verdict. You may take the pleadings in the case and all of the exhibits which were introduced into evidence, as well as these instructions and the two forms of verdict with you to your room where you are to deliberate. The cause is with you, gentlemen.

162 Counsel for plaintiff noted a general exception to the instructions of the Court as given to the jury, with the right to note specific exceptions at a later time.

The jury retired to consider of their verdict and thereafter returned into court the following verdict:

"We, the jury, find for the plaintiff and assess his damages at the sum of $9,000 U. S. Cy.

P. GARCIA, *Foreman.*"

The end.

163 *Stenographer's Certificate.*

I, Arthur J. Harvey, Official Stenographer of the District Court of the United States for Porto Rico, hereby certify that the foregoing document, consisting of one hundred and forty typewritten pages, is a true and correct transcript of all the testimony in the case

of Felix Guzman *v.* Julian Herencia, tried at Mayaguez in the above entitled court on the dates therein mentioned, which case was reported by me in shorthand upon the trial thereof.

ARTHUR J. HARVEY,
Court Stenographer.

164 I, Bernard S. Rodey, do hereby certify that I am the judge before whom the above entitled cause was tried; that Arthur J. Harvey was the official stenographer of the court who reported said cause; that the annexed and foregoing shorthand report of the evidence, duly certified to by the said official stenographer, is the report of the evidence in said cause and contains all of the evidence offered, given or introduced in said cause by the respective parties upon the trial thereof; all objections and motions of the said parties thereto, or any part thereof, and all rulings of the court upon such objections and motions, and all exceptions to such rulings, as well as the charge of the court to the jury, the objections thereto, the rulings thereon and the exceptions to said rulings; the said report with this certificate is ordered to be filed and made a part of the record in this cause.

Signed this 16th day of May, 1908.

B. S. RODEY,
Judge of the District Court
of the United States for Porto Rico.

And the said defendant, Julian Herencia, on the 16th day of May thereafter, and within the time allowed by law, tendered this, his bill of exceptions, as aforesaid only, it having been reduced to writing and all of the exceptions taken by the defendant during the progress of said trial being embraced therein, praying that the same be signed, sealed and made a part of the record in this cause, which is accordingly done this 16th day of May, 1908.

B. S. RODEY,
Judge of the District Court
of the United States for Porto Rico.

165 *Journal Entry.*

(June 1, 1908.)

FELIX GUZMAN
vs.
JULIAN HERENCIA.

Comes now F. L. Cornwell, Esq., attorney for the plaintiff herein and calls the Court's attention to the fact that in the transcript of record and bill of exceptions heretofore settled in this cause, it appears under date of February 26, 1908, that the Court made a statement with reference to Doctor Joaquin Martinez Guasp being called as a witness, and that he, Mr. Cornwell, stated that he would like

to have it appear that such witness was brought in by agreement of counsel, and that the Court answered "Yes, Counsel agreed that the Court should send out such a man," and that this statement of the Court is a diminution of the record; and

Thereupon, on full argument of the matter, counsel for the defendant being present and the Court knowing the facts and occurrences of its own knowledge, adds in the transcript and now hereby enters *nunc pro tunc* after its statement aforesaid additional words so that the same is made in said transcript to reas as follows: "Yes, Counsel agreed that the Court should send out such a man, and they agreed that his evidence should be considered as correct.

And it further appearing to the Court that it will be impossible to prepare and file the transcript of the record herein in the Supreme Court of the United States within the time specified in the writ of error, now, upon application of the attorneys for the defendant, the time for filing said transcript is hereby extended for thirty days.

166 In the District Court of the United States for Porto Rico.

FELIX GUZMAN
vs.
JULIAN HERENCIA.

I, John L. Gay, Clerk of the District Court of the United States for Porto Rico, do hereby certify the foregoing one hundred and sixty-five typewritten pages, numbered from 1 to 165, inclusive, to be a full, true and correct copy of the record and proceedings in the above and therein entitled cause as the same remains of record and on file in the office of the clerk of said court, and that the same constitute the return to the annexed writ of error.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, this 17th day of June, A. D. 1908.

[Seal United States District Court for the District of Porto Rico.]

JOHN L. GAY,
Clerk District Court of the United States for Porto Rico.
By A. M. BACON, *Deputy Clerk.*

167 *Writ of Error.*

In the District Court of the United States for Porto Rico.

FELIX GUZMAN
vs.
JULIAN HERENCIA.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judge of the District Court of the United States for Porto Rico, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in said District Court before you, between Felix Guzman, Plaintiff, and Julian Herencia, defendant, a manifest error hath happened to the great prejudice and damage of said defendant, as is said and appears by the petition herein.

We, being willing that error, if any hath been should be duly corrected, and full and speedy justice done in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the City of Washington within sixty (60) days from the date hereof, that the record and proceedings aforesaid, being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, this 10th day of April, A. D. 1908.

[Seal United States District Court for the District of Porto Rico.]

JOHN L. GAY,
Clerk Dist. Court of U. S. for Porto Rico.

Allowed to operate as supersedeas, this 4/10/08.
B. S. RODEY,
District Judge.

Service of the within writ of error and receipt of a copy thereof is hereby admitted this — day of April, 1908.

——— ———,
Att'y for Defendant.

168 [Endorsed:] No. 193, Mayaguez. In the Dist. Court of the U. S. for P. R. Felix Guzman *vs.* Julian Herencia. Writ of error. Copy hereof lodged in my office for attorney for the plaintiff, and the same delivered to plaintiff on the 21st day of May, 1908. John L. Gay, Clerk, by A. M. Bacon, Deputy. Filed Clerk's Office, United States District Court, April 10, 1908. John L. Gay, Clerk of the Court.

169 *Citation.*

In the United States District Court for Porto Rico.

FELIX GUZMAN
vs.
JULIAN HERENCIA.

UNITED STATES OF AMERICA, *ss:*

The President of the U. S. to Feliz Guzman and F. L. Cornwell, his attorney, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be held at the city of Washington, within sixty days from the date of this writ, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States for Porto Rico, wherein Julian Herencia is plaintiff, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Bernard S. Rodey, Judge of the District Court of the United States for Porto Rico, this 10th day of April, A. D. 1908, and of the independence of the United States the one hundred and thirty second.

[Seal United States District Court for the District of Porto Rico.]

B. S. RODEY,
Judge of the U. S. Court for Porto Rico.

Attest:
JOHN L. GAY, *Clerk.*

[Endorsed:] No. 193, Mayaguez. In the Dist. Court of the U. S. for P. R. Felix Guzman *vs.* Julian Herencia. Citation. Filed Clerk's Office, United States District Court, April 10, 1908. John L. Gay, Clerk of the Court. Marshal's fee, $2.00.

170 Form No. 282.

Return on Service Writ.

UNITED STATES OF AMERICA,
The District of Porto Rico, ss:

I hereby certify and return that I have served the annexed citation on the therein-named F. L. Cornwell, attorney for Felix Guzman, by handing to and leaving a true and correct copy thereof with the said F. L. Cornwell personally at Mayaguez in said District on the 21st day of May, A. D. 1908.

H. S. HUBBARD, *U. S. Marshal,*
By RALEIGH F. HAYDON, *Deputy.*

Endorsed on cover: File No. 21,286. Porto Rico D. C. U. S. Term No. 490. Julian Herencia, plaintiff in error, *vs.* Felix Guzman. Filed August 4, 1908. File No. 21,286.

No. 46.

Office Supreme Court U. S.
FILED
APR 12 1910
JAMES H. McKENNEY,
Clerk.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM 1909

No. 400.

JULIAN HERENCIA, PLAINTIFF IN ERROR,

vs.

FELIX GUZMAN.

In Error to the District Court of the United States for Porto Rico.

BRIEF IN BEHALF OF PLAINTIFF IN ERROR,

JULIAN HERENCIA.

PRESS REAL BROTHERS.
SAN JUAN, P. R.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 490.

JULIAN HERENCIA, PLAINTIFF IN ERROR,

vs.

FELIX GUZMAN.

This is an appeal from the United States district court for Porto Rico. The plaintiff in error was the owner of a residence building in the city of Mayagüez. The building was an old fashioned structure, with eaves extending over the sidewalk. The defendant in error claims that on the night of November 4th, 1907, he was walking on the sidewalk, under the eaves of this house, when a portion of the same gave way, and, falling, struck him in such a manner as to cause a compound fracture of his thigh. The plaintiff in error is charged with negligence in not having kept his house in proper repair. The cause was tried before a jury, and a verdict for nine thousand dollars rendered against plaintiff in error. Judgment was entered accordingly, and it is from this judgment that an appeal was taken.

ADMISSIONS BY PLAINTIFF IN ERROR.

The plaintiff in error admits that at the time and place stated, the defendant in error met with the accident complained of; that a portion of the eaves of the house owned by plaintiff in error fell and caused the accident; that defendant in error was subjected to great physical pain; that he will remain crippled for life, by reason of the fact that one leg will be from one to two inches shorter than the other; we admit the correctness of bills rendered defendant in error by physicians and druggists; and we admit the loss of time and wages as stated; but we deny negligence.

ASSIGNMENTS OF ERROR.

a. The evidence fails to show negligence on the part of plaintiff in error, and hence he was not liable. In this,

the verdict and judgment are not sustained by the evidence.

b. The evidence failed to show that the defendant in error will be unable to follow his avocation in life, or that his permanent earning capacity was affected by said accident.

c. Excessive damages appear to have been given under the influence of passion, prejudice, or mistake.

d. The court erred in admitting the testimony of the physician, Joaquín Martinez Guasp, as correct; and further, erred in changing the record relative thereto, after the bond on appeal had been given and approved.

e. The court erred in refusing to allow Dr. Gonzalez to testify as a witness in behalf of plaintiff in error.

f. The court erred in striking out the testimony of Juana Lopez.

g. The court erred in striking out the testimony of Claudio Rebollo.

h. The court erred in reducing the only issue presented to the jury to the question of whether or not the accident was due "to an act of God."

i. The court erred in entering judgment.

The evidence fails to establish the negligence of plaintiff in error and, hence, releases him from liability in the premises. Not only did the defendant in error fail to show that the owner of the building was negligent in his care of the same, but he failed to show that there was reason to believe that the structure was unsafe.

To prove that the building was in an unsafe condition, the defendant in error called Alonzo Aguilar, the only witness by whom it was attempted to establish the danger arising from the condition of the structure in question. He had been the inspector of public works for Mayagüez since the August preceding the accident. He testified in substance as follows:

(By inadvertance, the testimony in the record is printed in full, that is to say, questions and answers are set out in full, in stead of reproducing the same in narrative form. We beg permission to submit the principal evidence upon which we rely in narrative form, thus remedying as far as possible the error in making up the transcript.)

My name is Alonzo Aguilar. I reside in Mayagüez; am a surveyor and inspector of public works for the city of Mayagüez. I examined the building in question upon the

9th of November, 1907, and made a plan thereof. About two-thirds of the eaves covering the side-walk had fallen down; that is, the roof that ran out over the side-walk. It was covered with concrete about two inches thick and extended over the side-walk about five feet. The day I examined the house (it) was in very bad condition. The rafter in front was bent; was misplaced; the condition of the wood was bad—rotten. The general condition was awful bad. I cannot say the weight of the cement that had fallen down, but a few hundred pounds; I judged from what remained. The condition of the wood where the supports joined the building was rotten. I saw only these two or three hanging from the wall (indicating brackets shown on the map verified by witness). The whole building was rotten—in bad condition.

Cross-examined by Mr. Mestre, the witness said:

I saw the house before the falling of the eaves; I was crossing there many times. I did not appreciate the bad condition the house was in before the falling of the eaves. The eaves were about five feet long; I measured them by those that were left standing. At this time am inspector of public works.

Mr. Palmer, the Mayor of Mayagüez, testified as follows: On the day after the accident I visited the building in question. Upon being notified that the house had fallen I immediately went over there and after I had spoken with the assistant of public works, I decided to use a power which exists under the laws of the municipality, to order the house torn down, to avoid disaster in view of the accident which occurred the previous night. The assistant and myself visited the place in company with Mr. Herencia, the owner. The building was in a ruinous condition. I do not remember that Mr. Herencia made any objection to the tearing down of the house. He complied with the order. Prior to the falling of the eaves we did not have any occassion to notify Mr. Herencia of the ruinous condition of the building, because, before the accident, it was not observed that the house was unsafe.

Such, in substance, is the evidence in support of the charge of negligence on the part of the plaintiff in error. (R. p.p. 41-46, inclusive.)

Testimony as to condition of building, tending to show that

plaintiff in error had not been negligent in the care of the property, and that causes other than those upon which the complaint rests were responsible for the accident.

Sabas Honori was the first witness called by the plaintiff in error, and he testified with reference to the condition of the building. He was the municipal inspector of public works. He said that the material of the building was in good condition, and both under examination by the court, and a rigid cross-examination by counsel, gave his reasons for saying so. In the examination of this witness, we respectfully direct attention to the questions asked by the Court, and submit whether or not they do not *appear* to snap with prejudice, and whether or not such action could fail to prejudice the jury:

The Court:

Well, did you make any inspection to see how this accident occurred, or what caused it? Did you or not? Answer that.

A. I examined the pieces.

Q. Pieces—pieces of what?

A. The pieces of the building in question.

Q. We are not concerned here in much of it, except those that held up the eaves. How did you find those?

A They had removed already the eaves. I found the pieces of timber which constituted or made the eaves.

Q. And what was the condition of them?

A. They were in good condition.

Q. How did they happen to break then, in your opinion?

A. Owing to a defect of construction. The pieces did not break.

Q. How did the whole roof happen to fall down then?

A. Owing to defective construction, etc. (R. p. 47.)

We respectfully ask attention to the prejudicial method of the court in the above. The questions were framed in a spirit antagonistic to plaintiff in error, although not so intended. For instance: The question by the Court: "*How did the whole roof happen to fall down, then?*" The *whole roof* had not fallen, but only a small section of the projecting eaves. We need scarcely say that such conduct by the court, even though well intended, must prejudice a jury; invariably, the jury locates the judge as in sympathy with the party in whose behalf such exaggerated statements are made.

Continuing, the witness said:

I examined the house inside and outside, and its different parts, and did not find it in a ruinous condition. I have had many years experience in inspecting houses and have built many. I have no diploma as a contractor, but as a surveyor.

Question by the Court:

Mr. Witness, when you examined this building, will you kindly tell the jury about the eave part of it, the part that fell down and injured this man? If you have had experience in putting up buildings and examining and knowing the weights that the timbers can bear, tell the jury what caused the building to fall down, if you know. If you don't know, say so.

(Why add "If you don't know, say so"? The witness had shown no disposition either to prevaricate or conceal information).

A. Those pieces have been cut diagonally, owing to the grade of the eave, the inclination of the eave, it must necessarily slip one point (joint) with the other and that occasioned the falling of the eave.

Q. Why did the eave fall? Was it because the bracket fell down, the roof broke or the bracket broke? What actually gave way?

A. Owing to the defective cut of the pieces which was not done properly.

Q. Of what pieces, the brackets or the rafter?

A. The rafters.

Q. Well, didn't the rafters stick out from under the main roof?

A. They projected but very little.

Q. This roof or eave stuck out over the whole sidewalk, didn't it?

A. No, sir; the part that was embedded and which formed part of the main body of the building projected.

Q. And you say it was because of the diagonal cut of the rafters that they failed to sustain the weight of the roof.

A. Yes, because that was not the proper cut for the construction of that eave. There are different cuts. The heavy rains had much to do with the falling of those eaves. The eaves were made of native timber. The next day the building was torn down. In answer to the Court the witness said that

the eave was embedded in the wall of the house; it was cut diagonally and one piece nailed to the other, and the outer part held by a bracket. 'It is my duty to notify the council if a building is in a ruinous condition. I never had occasion to notify the council about this house and I never inspected it'.

CROSS-EXAMINATION.

'I was appointed inspector of public works in Mayagüez on October 22nd, about twelve or thirteen days before the accident. Prior to that time I had acted as inspector of bridges and roads for the bureau of public works in the department of the interior. (Insular government.)'

To continue at length with the examination of this witness would not be profitable, as the most of it is but the customary effort to shake the statements of the witness. The substance and the ultimate result of his testimony is that the material of which the building was constructed was in a sound condition on the day after the accident, and the witness attributes the accident, to the heavy rains and defective construction. His testimony begins at folio 80, page 46, Record, and is concluded at the bottom of page 54. Here we have inspector against inspector.

Crispiano Rodil followed as a witness for the defense. (Record, pp. 55–61, inclusive.) The court conducted a good portion of the direct examination, evidently seeking to obtain the truth. The witness appears to have been competent and impartial. The substance of his testimony is to the effect that the timbers were in good condition: that the tiled roof absorbed water greedily; that the rains had been heavy, and that, notwithstanding the building was sixty year old, the timber of which it was constructed was sound, although he had no doubt the age of the structure contributed to the accident. Rodil may be considered prejudiced because of the fact that he was employed by plaintiff in error to do the work of tearing down the building as ordered by the mayor; but he does not exhibit such prejudice; indeed, appears less prejudiced than Aguilar, the only witness presented by defendant in error who declared the building to have been unsafe.

Eugenio Caimara's testimony, (Record pp. 67–70, inclusive) counsel for plaintiff in error does not consider very material

The testimony of Juana Lopez was stricken out. The ruling of the court on this point is assigned as error. (Assignments of error in this brief marked "f".) Her testimony was not

convincing, standing alone, but the eave having fallen in front of her door, we think it was error not to allow her statement to go to the jury, as it tended to support the testimony of other witnesses to the effect that the building was sound. Had the timber been as rotten as stated by Aguilar, it is evident that sand or mortar would have been falling in greater or less quantities under her immediate observation. An exception was taken to the ruling of the court. (R. p. 72.)

We also submit that the court erred in striking out the testimony of Claudio Rebollo. (Record, pp. 72–3.) An exception was taken to the ruling of the court, (Record, p. 73), and appears in this brief under the assignments of error under the letter "g". The conditions and reasons are substantially the same as those governing the ruling in striking out the testimony of the preceding witness, except that, in this case, the witness was a mechanic and would have been more likely to have noted a threatening condition of the eaves, or any other part of the building.

Mr. Herencia, the plaintiff in error, after stating that he was the owner of the building, said that he had no reason to suppose that any part or portion of the structure was in a dangerous condition; that all of the apartments of the house were occupied by tenants, and that no complaint had been made to him; that he made improvements from time to time as they appeared to be required or were called for, and that although he passed the house daily several times, he had seen no evidence whatever of any weakness in the structure. (R. p. p. 82-83.)

Therefore, in view of the testimony referred to, we submit that defendant in error failed to establish the negligence of plaintiff in error, and that, as a fact, no negligence is shown in the premises.

II.

While it is conceded that any person with a broken leg must suffer, and for a greater or less period of time be incapacitated for physical labor, yet there is much doubt in this case: (1), if the patient received proper treatment; and (2) whether he was not so much under the influence of liquor at the time of the accident as to have materially increased his suffering, and delayed his recovery.

Three physicians appeared in behalf of defendant in error: Doctors Gimenez, (the family physician), Vadi, and Perea. Dr. Vadi assisted in the operation but did not see the patient until the day after the accident. (R. p. 28).

Dr. Gimenez testified that he first saw defendant in error after the accident at the home of the latter; he stated that his patient was suffering very much and was delirious on account of pain. (R. p. 23). The doctor further states: "He was examined before by Dr. Font, and when I arrived there he had the dressing put on." (R. p. 24).

The fractures were then described by the witness as having been one on the upper part of the femur and one lower down. (As there is no controversy over the nature of the injury, no further mention will be made by way of description.)

Continuing, the witness said: I set them (the fractures) the same night or the next day, assisted by doctors Perea and Vadi. The patient has been under my care since that time. He will be lame for life; it (the accident) will not affect his general health; he will be a cripple for life; he has suffered much during four months, and was in bed for about two months; in my opinion, it will be two or three months more before he will be able to return to business of any kind. (This testimony is found in full, R. p. 24.)

At page 25 of the Record the hostility of the witness to plaintiff in error is clearly manifested, although, by examining his testimony at pages 26 and 27, he appears to have answered vital questions fairly; the spirit in which the witness stated his method of treatment clearly demonstrates the presence of a keen controversy among the doctors.

The witness, Dr. Perea, who assisted in performing the operation as stated, reiterates the statements of Dr. Gimenez. (R. p. p. 27, 28, 29 and 30).

The evidence of Dr. Perea establishes the fact that the operation was performed the day after the accident, and, as will appear later in the discussion, this fact may prove important. Otherwise, the statement of Dr. Perea (R. p. p. 30, 31, 32 and 33) are nearly confirmatory of the statement of Doctors Gimenez and Vadi to the effect that the operation performed was correct as to its character and proper in point of time. Dr. Font, called as witness by plaintiff in error, contradicts emphatically, and upon a serious point, the statement of Dr. Gimenez as to the condition of the defendant in error on the night of the accident. It is to be remem-

bered that Dr. Font was the first physician to attend upon defendant in error, and that, according to the statement of Dr. Gimenez, just quoted, Font had already given such relief as the conditions at that time warranted, before the arrival of Dr. Gimenez. The witness said:

> Being there at the house, Dr. Gimenez Nusa came. Between both of us we made an examination of the fracture of the superior part of the thigh. It caused *us* a good deal of pain to make this examination, because this man was under the influence of a great excitement, which could not permit (us) to make the examination with care. Nevertheless, we arrived at the conclusion that it was a fracture of the superior third of the thigh, under the superior third of the thigh, and another fracture in the inferior third in the shape of a T. It was impossible that same night, owing to the special conditions in which the patient was in those moments, to make the application of any apparatus or make any reduction, for which reason my colleague, Dr. Gimenez, resolved that the apparatus should be applied next day, and I, thinking that if the apparatus was not applied in those moments, it should not be applied at least for 5 days afterwards, in accordance with the opinions of fractures by Americans and French, and Dr. Henequien. I desisted on my part to attend to the operation withdrawing from the attendance of this man. (R. p. p. 73-4.)

(Counsel begs to state that the witness should not be held responsible for the foregoing awkward translation.)

Continuing, the witness said:

> The apparatus was applied the next day, at about 11 or 12 o'clock. It was not a proper treatment from the fact that (if) the apparatus was not applied at the first moment, they should have waited until four or five days afterwards in accordance with opinions which I have cited. (R. p. 74).

Upon cross-examination the following questions and answers appear:

Q. In cases of fracture, do they generally suffer pain of any kind after five months?

A. Yes, sir.

Q. And how long does it take to cure; more or less to be in a general condition to walk and work?

A. In the present case I must state that it is of special conditions; on account of special individual conditions.

Q. What are those special individual conditions?

A. That man is an alcoholic.

Q. Supposing that this man was an ordinary man?

Mr. Cornwell: I move to strike out that answer.

The Court: The motion is overruled.

Mr. Cornwell: Note an exception.

Q. In an ordinary man, how long does it take to cure a case of this kind, of double fracture?

A. Two months.

Q. Do you think in two months he can be able to work?

A. Yes, sir.

Q. And you spoke about a certain nervous condition of the man the night of the accident?

A. Yes, sir. Through delicacy I didn't want to state the words but if I am compelled to I will state the facts.

Q. What were they?

... That he was drunk, under the influence of liquor.

Q. Why do you say so?

A. I know it in the first place from the smell that he had and the same time by the treatment used, which was ammonia.

Q. Did you operate or begin the treatment that same night?

A. No, sir.

Q. For what account?

A. Precisely for that condition in which he was.

Q. What condition?

A. He was drunk. (Testimony of this witness is found R. p. p. 73, 74, 75, 76 and 77)

As further showing the condition of defendant in error, at the time of the accident Ignacio Frasqueri was called as a witness in behalf of plaintiff in error. The witness was at the time an assistant physician (practicante) in charge of the emergency hospital. (R. p. 79). This witness was the first to treat defendant in error after the accident. He was asked this question (R. p. 79):

Did you notice anything irregular in his state? (Meaning defendant in error when brought to the hospital).

A. Yes, sir.

By the Court:

Do you know what that was brought on by? Was it by the accident or by intoxication, or what? Could you tell as an assistant physician?

A. I am inclined to believe that it was owing to having drunk something.

Mr. Mestre:

Did he act like an intoxicated man?

The Court:

You have all the court will permit on that point.

Why should not more have been permitted, if necessary to disclose the truth?

On cross-examination (R. p. 81) the witness reiterated his belief that the defendant in error was intoxicated when brought to the emergency hospital, accompanied by explanations illustrative of his reasons for making the statement.

The defendant in error himself testified (R. p. 21) that on the night of the accident he visited a café just before starting for his home, but states that he only drank one glass of wine; that he drank no other kind of liquor that night.

Eduardo Fort, who accompanied defendant in error to the café, had supper with him, and was walking with him at the time he was injured, said that he did not remember whether or not the defendant in error drank any wine or other liquor during the time they were in the café, but did remember the food with which they were served.

We do not comment on the testimony given by the wife and daughter of defendant in error relative to the condition of defendant in error on the night of the accident.

Such, in substance, was the testimony offered by both sides relative to the condition of the defendant in error on the night of the accident. It would not be surprising if, even though more or less under the influence of alcoholic liquors at the time, the shock thereof should sober him. It is to be remembered, however, that the assistant physician in charge of the emergency hospital, and Dr. Font, who were the first to treat Guzman after the accident, testify absolutely that the latter was intoxicated; or, at least, had drank sufficiently that the smell of the liquor attracted their attention. This being true, the defendant in error must have indulged in something more than one glass of wine. The physician who treated the defendant in error, later, say that the latter was suffering from traumatic delirium. All of the facts considered, we believe it is established

that Guzman imbibed rather freely that night, probably of rum, and that his subsequent condition, regardless of the treatment given him by physicians, aggravated and prolonged his sufferings.

Counsel for plaintiff in error will not attempt to discuss the controversy between the physicians relative to the treatment administered, beyond submitting the thought that, accepting the uncontroverted facts, the defendant in error appears to have unduly suffered from one of two conditions: (1), intoxication at the time of the accident; or (2), unfortunate treatment by the physicians after the accident.

III.

The order made to the effect that a physician should examine defendant in error under the instructions set forth, without knowledge of the surrounding conditions, was not only extraordinary, but was valueless, regardless of the skill of the physician selected; and the further order that the statement made by this physician must be accepted as correct, was unlawful, and could not be cured by stipulation or judicial order, because it prohibited the jury from passing upon the fact.

The Court erred in the proceedings (R. p. 38), under which a physician was sent under agreement by counsel to examine the defendant in error and to testify as to the results of that examination. It might, perhaps, be permissible to make such an order, but we submit that even then the order could not be lawfully made with any regard whatever for the rights of the plaintiff in error except upon an agreed statement as to the condition of the defendant in error at the time of the injury, and the exact treatment that was administered to him Yet it appears that the order of the court was to the effect that the statement of the physician appointed must be accepted as correct, notwithstanding the physician thus selected must reach his conclusions from an examination of the defendant in error several months after the accident ocurred, and without accurate information, or, for that matter, any information, of the condition of the defendant in error at the time the accident occurred, or the treatment, or the method of treatment adopted by the physicians having him in charge. In addition to the impossibility of the execution of such a task, an impossibility that is self-evident, we have presented the extraordinary result

of such an order, which, in the opinion of counsel, is such a violation of law as to challenge the attention of this Court, in that it left the jury without the option of accepting or rejecting a portion or all of what the witness might say.

Again, the record was certified as correct by the stenographer who reported the case, and also so certified by the judge of the court on the sixteenth day of May, 1908. But, notwithstanding these certificates, on June 1st, 1908, the court added the memorandum set forth at page 38 of the record.

The counsel who signs this brief was present when the court thus modified the record, but not the counsel who tried the cause. Counsel for plaintiff in error does not question the good faith or perfect integrity, professional and personal, of counsel for defendant in error, but, on the contrary, if it were at all necessary, would find pleasure in an unequivocal declaration in support thereof. However, we submit that it was not only error, to which exception was duly made, but an error too dangerous in character to be permitted to pass, to thus change a record after it has been settled, and especially in the absence of counsel who made the agreement, or entered into the stipulation.

IV.

The Court erred in refusing to allow Dr. Gonzalez to testify as an expert in behalf of plaintiff in error. (R. p. 77).

We are aware that, in offering a witness as Dr. Gonzalez was tendered by plaintiff in error, the party producing the witness should state the purpose for which he is offered. But in this case, the reason is plain, to wit: The court evidently considered all medical controversies settled and the jury bound by the statements of Dr. Martinez Guasp. This theory seems the more probable from the remarkable ruling of the court found at the bottom of page 86, record. By this utterance the court in effect took the case from the jury in all of the most important phases governing the assessment of damages. It appears to have been a voluntary utterance on the part of the court, and counsel for Herencia does not appear to haven taken an exception. But as both rulings, or orders, made by the court upon which the remarkable utterance under consideration was based, were excepted to, we believe the point protected, even if the ruling in itself was not such a violation of the rights of plaintiff in error as to demand a new trial, regardless of an ex-

ception at all. It must be observed that of its own motion, the court did away with all question of proper treatment, intoxication—everything, save the one question of negligence; and even with negligence established, many other questions were eliminated which the jury should have considered in making the assessment of damages, but which this unasked-for ruling of the court eliminated.

V.

In all of this record, there is not a line of testimony showing, or tending to show, that the earning capacity of the defendant in error was permanently reduced.

The defendant in error is a book-keeper and was following that occupation at the time of the accident. While the accident is to be regretted, yet, in the absence of a finding in exemplary damages, the recovery is limited to the following rule. The court instructed against exemplary damages. (R. p. 89).

a. Loss of time.
b. Physicians' bills and medicines.
c. Physical and mental suffering.
d. Decreased earning capacity.

In Carpenter vs. Mex. Nat. R. Co., 39 Fed. Rep., page 318, Judge Maxey instructed the jury as follows:

> "In making your estimate of such damages, you are authorized to consider (1), the value of the time lost by the plaintiff during the period in which he was disabled, from his injuries, to work and labor, taking into consideration the nature of his business and the value of his services in conducting the same; (2), fair compensation for the mental and physical suffering caused by the injury; (3), the probable effect of the injury in future upon his health, and the use of his injured foot and leg, and his ability to labor and attend to his affairs, and, generally, any reduction of his power and capacity to earn money and pursue the course of life which he might otherwise have done. The object of the law in cases like the present is simply to compensate the injured party for the injuries he has sustained; nothing more."

Further illustrating the same principle we cite the case of Davidson vs. Southern Pacific Railroad Co., Fed. Rep. Vol. 44, page 481, where the principle of recovery for compensatory damages in a personal injury case is set forth and clearly defined. The instructions were given by Judge Maxey.

In further illustrating the same principle, we cite Hamilton vs. The William Branfoot, 48 Fed. Rep., page 916. This is an opinion by Judge Simonton in the United States District Court for South Carolina.

As a further illustration of the principle in assessing damages in personal injury cases, we cite the case of City of Denver vs. Sherret, 88 Fed. Rep. at page 236, Circuit Court of Appeals for the 8th Circuit.

Further illustrating the principle of recovery in personal injury cases we cite the case of Baltimore and Ohio Railroad Co. vs. Henthorne, 73 Fed. Rep., Circuit Court of Appeals for the 6th Circuit. The instruction of the trial court which was approved is found at page 637 and the opinion of the Circuit Court of Appeals, which still more clearly defines the true principle to be invoked, is found at page 641.

VI.

Under the rule as above defined, the verdict was so excessive as to justify reversal, even though this court should hold that plaintiff in error was negligent.

According to the testimony of Manuel Graña, manager of the bank in which defendant in error was employed, an accurate statement of the earning capacity of Guzman appears. (R. p. p. 61, 62, 63 and 64). Placing this earning capacity of defeadant in error at most at $50.00 per month, and his loss of time, while not absolutely proved, but allowing a very liberal estimate, let us see what the aggregate of these three items would amount to. The accident occurred on the 4th of November, 1907; the case was tried about the first of March, 1908. At that time, then, the defendant in error had been out of employment, November, December, January and February, four months That would be $200. Let us allow him four months more in which to recover, and that would add $200 to the liability. That would make $400. This is allowing eight months in which to recover from the fractures

The court then said that he must be further allowed "what he had paid for drugs, medicines and medical attendance". Drugs and medicines are probably the same and the bill rendered amounts to $37.81.

The bill of Dr. Gimenez is presented at $400.00.

Luis Vadi, another physician, presented his bill for $82.00.

The next doctor who presents himself along with his bill, is Dr. Pedro Perea Fajardo for $180.00.

The total liability then, under that instruction, would be $1,099.81.

The court said that he must be allowed for the amount of suffering he endured. There is no absolute criterion for the jury in assessing damages for suffering. But the assessment must be reasonable, and if it is within reason, the court will not disturb the findings of the jury. The court also said in the same instruction that plaintiff would be allowed for the amount of expense he was liable to pay in the future, and the duration of the injury and suffering.

Four hundred dollars, without any doubt, would more than cover future losses because of medical attendance and medicines. In fact, it is unreasonable that a person forty-five years of age requires more than eight months in which to recover from such an accident; and after the first four months he cannot need medical attendance or drugs beyond a very limited amount. In fact, if he was not affected by alcohol in his system at the time of the accident, and hence his treatment interfered with because of his own act, then he should recover in four months, unless the doctors blundered. But let us make it liberal and call it $400 more, and we then have $1,499.81 for medical attendance, drugs and loss of time. There is no evidence showing a reduction of the earning power of the defendant in error as a book-keeper or musician after his recovery, and in the absence of such a showing, he is not entitled to recover for such loss.

Allowing, then, $1,099 81 for medical attendance and drugs, including loss of time, (which I again say is very liberal), and $400.00 more as an estimate for future losses because of medical attendance and medicines, and then deduct this total $1,499.81 from $9,000.00, and there remains the sum of $7,500.19 allowed for pain and suffering.

There is in our opinion a just inference that the jury must have made a wild guess, based upon an indefinite notion

of the case, or were wholly governed by prejudice or mistake in reaching a verdict.

Upon this sort of verdict, we cite the case of Alabama G. S. R. vs. Carroll, 84 Fed. Rep. 772. This was a decision by the Circuit Court of Appeals, 5th Circuit. It is a very long decision, and we turn to pages 780, 781, 782, etc., of the opinion. In this case the plaintiff was a railroad man, twenty-two years of age, both of his legs were cut off and the jury was addressed upon the theory that inasmuch as he was totally disabled from further pursuing his profession, damages must be computed upon the value of his life work for forty years more at the rate of wages he then received. At the same time it was claimed that his chances for promotion should be considered. He asked for $50,000, the jury gave him $30,000, the verdict was reduced to $15,000 by the court, and accepted. The appeal was nevertheless taken and a new trial granted. Pardee delivered the opinion of the court, Maxey, the district judge, concurring, but refusing to assent to certain propositions embodied in the opinion. McCormick, circuit judge, dissented but did not express his views.

This reference is given for the purpose of illustrating this principle. The amount to be recovered is *limited by law*, in that the law fixes the rule governing the recovery, and these rules should be given in full to the jury, if they are given at all. While the principle stated by the lower court was right, it lacked definite advice as to detail, so that the jury was left more to sentiment than to law. Apparently no probability of life, *no distinction as between what the plaintiff earned before his injury, and how much that earning capacity was reduced because of the result of his injuries*, was considered.

Illustrative of this principle is the case of the Homer, reported in the 99 Fed. Rep., page 795. The excerpt referred to is on page 794.

The court said:

> "Ever since the occurrence, the libelant has been in a helpless and pitiful condition and a great sufferer. He has no use of his lower limbs and it is reasonably certain that he will remain a helpless cripple during the balance of his life, although the physician who attended him admits that he can not say it is im-

possible for him to recover." The court allowed a verdict of $12,000 to stand.

This court in the case of the Steamboat George Washington against Cavan, allowed a verdict for $10,000 to stand.

76 United States, page 788.

The allowance which this court admitted to stand was $1,000 more than in this case, yet the injury, evident status of the parties, and the utter ruin of the plaintiff's life in the case referred to, was such that comment in the way of comparison is unnecessary.

In Clapp vs. Hudson etc. R. Co., 19 Barb. (N. Y) 461, plaintiff's leg was broken and his head somewhat injured in a collision. He was obliged to go on crutches for three or four months, and though the injured leg, when healed, was somewhat shorter than the other, yet he recovered his usual health. The court reduced a verdict for $6,000 damages to $4,000.

But it is of little profit to cite various cases in which verdicts in personal injury cases have been held excessive and when they have been sustained, as each case must stand upon its own merits. In the case at bar the court instructed the jury that no exemplary damages could be awarded. It appears, then, that the question in issue is reduced to a rule that is reasonably clear: the person injured may recover compensatory damages, and compensatory damages mean the amounts that he has expended, already set forth in this brief, and a reasonable sum for his suffering. It appears clearly enough in this case, even from the testimony of the injured man's physicians, that he will enjoy his usual good health in due time. We have allowed four months from the date of the trial, at $100.00 per month, as an estimate of future expenditures: an allowance that was neither proved nor asked for. We believe this to be fair and liberal both as to time and amount. It is to be remembered that his actual salary was $30.00 per month. This leaves the defendant in error a judgment for $7,500.00 for physical suffering after all other estimates have been allowed upon a very liberal basis. We believe the amount to be excessive. We believe it to have been the result of many unfair utterances from the bench, although we know the court intended to be just: and we believe also that it is the result of numerous errors

which have been indicated in this brief; and also the result of evident prejudice.

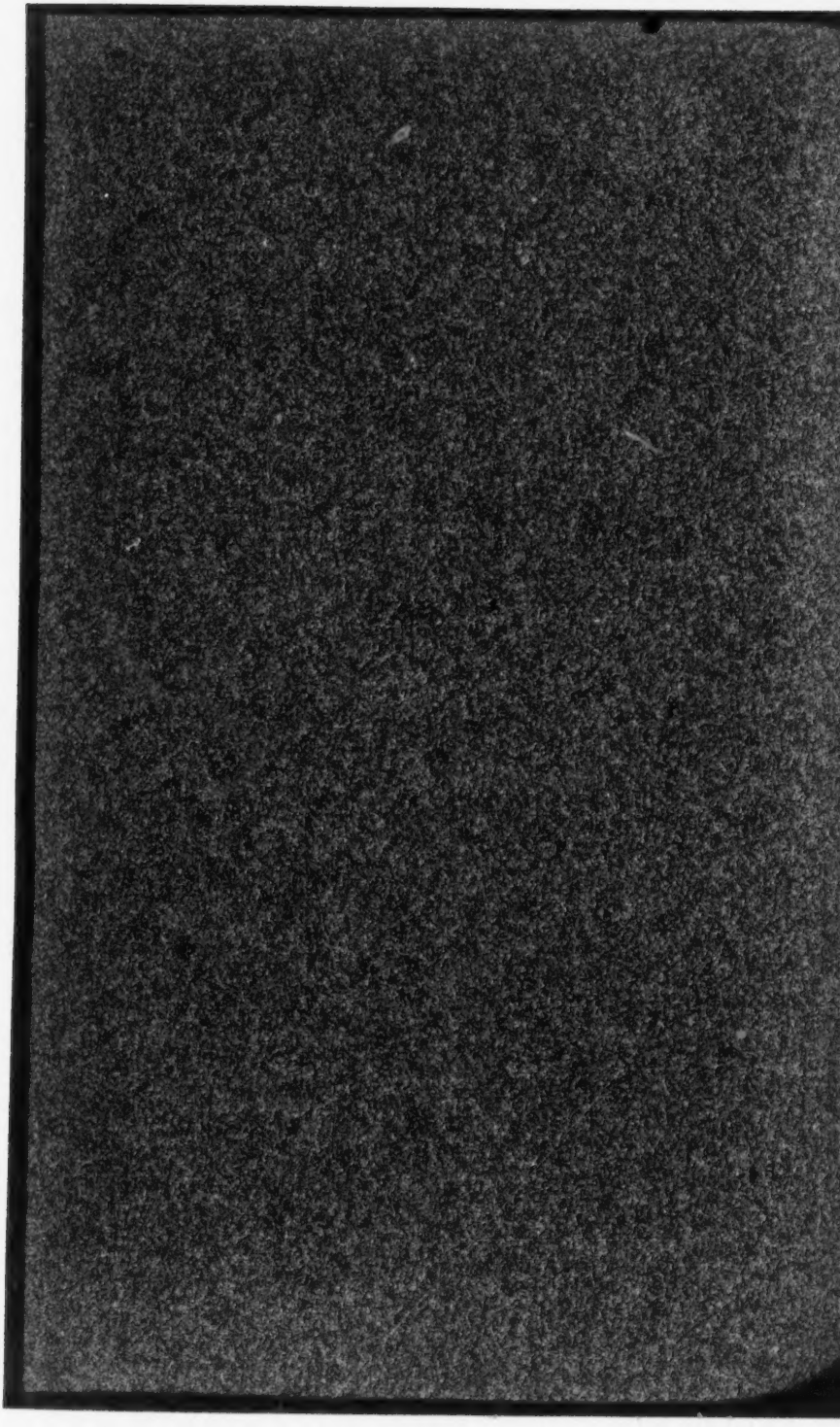
We do not believe that the negligence of plaintiff in error was shown, and we do believe that the accident was one of those unavoidable occurrences against which no human foresight could have guarded. Believing this to be true, we ask that the judgment of the court be reversed and the case dismissed.

If, nevertheless, this court shall believe the plaintiff in error to have been negligent, then we respectfully urge how impossible it was for him to know of the danger existing, and either that the case be sent back for a new trial or that the judgment be reduced to reasonable proportions.

Respectfully submitted,

WILLIS SWEET,

Counsel for Plaintiff in Error.



IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 46.

JULIAN HERENCIA, PLAINTIFF IN ERROR,

vs.

FELIZ GUZMAN, DEFENDANT IN ERROR.

BRIEF FOR DEFENDANT IN ERROR.

Statement.

This is a writ of error from the United States District Court for the District of Porto Rico. Defendant in error was plaintiff below and proved on his behalf the following facts:

The plaintiff in error was the owner of a certain tenement or residence on McKinley street, in the city of Mayaguez, Porto Rico. Said building was of frame construction, very old, and was built flush with the sidewalks of McKinley street, and the roof was of mortar and tile, very heavy, and extended over the sidewalk of McKinley street one meter and twenty centimeters, or about four feet. While defendant in error was walking along the sidewalk of McKinley street and under the projecting eave or roof of said residence or tenement of plaintiff in error on the night of the 4th day

of November, 1907, the roof and eaves of said building or tenement gave way and fell down to the sidewalk as a result of age, dangerous, decayed condition, and want of repair, falling upon the defendant in error, bruising and seriously injuring him and causing a compound fracture of the femur, and also causing permanent shortening of left leg of defendant in error of about three inches, making defendant in error a cripple for life and causing his confinement for from four to six months and the suffering of more or less pain continually as a result of said injury. At time of trial plaintiff was still sick as a result of said accident and unable to use his injured leg in any manner.

The plaintiff in error assigns nine errors, numbered by letters from A to I, inclusive, and each of the alleged errors will be treated by defendant in error in the order assigned in plaintiff in error's brief.

A.

The evidence fails to show negligence on the part of Plaintiff in Error, and hence he was not liable. In this the verdict and judgment are not sustained by the evidence.

This assignment of error is without any merit, first, for the reason that no such question was raised by plaintiff in error by motion for direction of verdict, nonsuit, demurrer to evidence, or bill of exceptions, or was saved in any other manner, and for the reason that the record shows plainly that the roof or eaves extended over a public sidewalk, that same was out of repair, condition was bad, material rotten, and that the question of negligence was fairly submitted to jury, and in accordance with the authorities hereinbelow submitted this court on writ of error will not disturb verdict of jury on questions of fact, nor consider any question of law unless properly raised in trial court.

Lawrence *vs.* McCalmont *et al.*, 2 Howard, 426; 11 L. Ed., 326:

"As to the sixth point on the question, whether the notice of the failure of Messrs. J. & A. Lawrence to repay the advances had been given; it was a mere question of fact for the consideration of the jury, as to whether the guarantor had reasonable notice or not. They have found a verdict for the plaintiffs, and we are not at liberty to disturb it in a court of error."

Gregg *vs.* Moss, 81 U. S., 564; 20 L. Ed., 740:

"The brief of the plaintiff proceeds to argue that the evidence before the jury does not sustain either of the allegations of advancing the money to the partnership, or the agreement of the plaintiff to convert it into capital of the partnership. With this we can have nothing to do. It was the province of the jury to determine whether either of these allegations was proved, for either of them was a valid defense to this action, and they have found in favor of defendant."

The United States Express Co. *vs.* Ware, 87 U. S., 543; 22 L. Ed., 422:

"Mr. Chief Justice Waite delivered the opinion of the court:

"In this case it is assigned for error—

"1. That the evidence of negligence does not support the verdict.

"2. That the action was barred by the statute of limitations, and that the court erred in its instructions on that point.

"We see no error in the charge and cannot examine the evidence to ascertain whether the jury was justified in finding as it did upon the issues of fact.

"The judgment is affirmed."

B.

The evidence failed to show that Defendant in Error will be unable to follow his avocation in life, or that his permanent earning capacity was affected by said accident.

This assignment of error is without merit, as no such question was raised in trial court in any manner whatsoever, nor does any exception taken by plaintiff in error during trial of this cause in court below cover same, nor was any instruction asked of jury on point requested, and the transcript of record plainly shows that charge of court on point involved was fair and fully covered the attempted assignment.

> New York, L. E. & W. Ry. *vs.* Estill, 147 U. S., 67; 37 Law Ed., 305:
>
> "The question was passed upon by the jury and found in favor of the plaintiff, and we cannot review their verdict upon the weight of the evidence."

> Mills *vs.* Smith, 75 U. S., 8 Wall., 32; Law Ed., 19, 348:
>
> "The counsel, in their arguments in this case, seem to have forgotten that this court have no right to order a new trial because they may believe that the jury may have erred in their verdict on the facts. If the court below have given proper instructions on the questions of law, and submitted the facts to the jury, there is no further remedy in this court for any supposed mistake of the jury."

C.

Excessive damages appear to have been given under the influence of passion, prejudice, or mistake.

This assignment of error is without merit, for there is absolutely nothing in the record to show any passion, prejudice, or mistake on the part of court and jury. The evidence in the cause, under the instructions of the court, was fairly submitted to the jury, and this court will not determine on writ of error whether the verdict in action for personal injuries is excessive.

> New York, L. E. & W. R. Co. *vs.* Winter, 36-71; 143 U. S., 60:
>
> "Whether the verdict was excessive, is not our province to determine on this writ of error. The correction of that error, if there were any, lay with the court below upon a motion for a new trial, the granting or refusal of which is not assignable for error here. As stated by us in .Etna L. Ins. Co. *vs.* Ward: 'It may be that if we were to usurp the functions of the jury and determine the weight to be given to the evidence, we might arrive at a different conclusion. But that is not our province on a writ of error. In such a case we are confined to the consideration of exceptions, taken at the trial, to the admission or rejection of evidence and to the charge of the court and its refusals to charge. We have no concern with questions of fact, or the weight to be given to the evidence which was properly admitted.'" 140 U. S., 91 (35:339), citing numerous cases.
>
> City of Lincoln *vs.* Power, 151 U. S., 437; 38 Law Ed., 225:
>
> "The plaintiff in error complains that the damages found by the jury were excessive and appear to have been given under the influence of passion and prejudice.

"But it is not permitted for this court, sitting as a court of errors, in a case wherein damages have been fixed by the verdict of a jury, to take notice of an assignment of this character, where the complaint is only of the action of the jury."

D.

The Court erred in admitting the testimony of the physician, Joaquin Martinez Guasp, as correct; and further erred in changing the record relative thereto.

The assignment of error is without merit, first, as to the admission of the testimony of witness, even if it had not been by stipulation, because counsel for the plaintiff in error did not raise any question as to its legality, and the record clearly shows (page 38) outside of the amendment of June the first it was by agreement and stipulation of counsel with the consent and approval of trial judge. The amendment of June 1, 1908, is nothing more or less than the settlement of the bill of exceptions and causing same to show what actually transpired during the trial of this cause, and same was made before the final adjournment of said term. However, waiving every other consideration, there was no error in admitting the testimony of Joaquin Martinez Guasp. Moreover, no such question was raised or saved in trial of cause, and the right of the court to amend record to show what actually transpired is inherent.

Gagnon *vs.* United States, 193 U. S., 456; Law Ed., 48-747:

"The power to amend its records, to correct mistakes of the clerk or other officer of the court, inadvertencies of counsel, or to supply defects or omissions in the record, even after the lapse of the term, is inherent in courts of justice, and was recognized by this court *In re* Wight, 134 U. S. 136, 33 L. Ed. 865, 10 Sup. Ct. Rep. 487; Gonzales *vs.* Cunningham, 164

U. S. 612, 623, 41 L. Ed. 572, 576, 17 Sup. Ct. Rep. 182, and United States *vs.* Vigil, 10 Wall. 423, 19 L. Ed. 954. It is also conferred upon courts of the United States by Rev. Stat., para. 899, 900, and 901 (U. S. Comp. Stat. 1909, p. 675)."

E.

The Court erred in refusing to allow Dr. Gonzalez to testify as a witness in behalf of the Plaintiff in Error.

This assignment of error is without merit, as the bill of exceptions shows that plaintiff in error did not set out what he expected to prove by witness, Dr. Gonzalez, as an expert, nor properly qualify him as an expert, nor offer to show that he had ever examined defendant in error, or had any knowledge of the condition of defendant in error or any other subject pertinent to the trial of said cause, or offer to prove by said witness anything pertinent to the issue.

Ladd *vs.* Missouri Coal & Mining Co., 14 C. C. A., 246:

"It will be observed that all the plaintiff offered to prove was 'the conversation between him and Murdock relating to the contract.' This offer was not accompanied by any statement as to what that conversation was, or that it was material to any issue then being tried. The insufficiency of the exception is rendered apparent by a single consideration. If this court should reverse the case because the witness was not permitted to state the conversation, what is there in this record to show or suggest that upon another trial, when the witness is allowed to state the conversation, a single word of it will be material to the case or admissible in evidence? The offer to prove the 'conversation,' without some statement as to what it was, and showing its materiality, was too general to be made the foundation of a valid exception. The

rule is well settled that the bill of exceptions must show the materiality of the evidence which was tendered and rejected. The evidence rejected, or a statement of what it tended to prove, must appear in the bill of exceptions. Packet Co. *vs.* Clough, 20 Wall., 528; Railway Co. *vs.* Smith, 21 Wall., 255; Thompson *vs.* Bank, 111 U. S., 529; 4 Sup. Ct., 907; Patrick *vs.* Graham, 132 U. S., 627; 10 Sup. Ct., 194; Lyon *vs.* Batz, 42 Mo. App., 606; Bener *vs.* Edgington, 76 Iowa, 105; 40 N. W., 117."

We submit, further, that the attempt of the defendant (plaintiff in error) to produce Dr. Gonzalez as a witness was inconsistent with the agreement to abide by the testimony of Dr. Joaquin Martinez Guasp, shown on page 38 of the record, which is the subject of assignment of Error D and has been discussed under the previous head.

F AND G.

The Court erred in striking out the testimony of Juana Lopez and of Claudio Rebollo.

The pleadings in this cause show that the plaintiff in error pleaded as his only affirmative defense, viz., mayor or superior force (Record, page 3). The testimony of these two witnesses was entirely immaterial and irrelevant to the issues made by the negative pleas or to this affirmative defense. The testimony of Juana Lopez is shown on pages 71 and 72 of the record. She stated that she was living in the house at the time the eaves fell; that she had no occasion to notice that the eaves were in bad condition; that she could see the eaves, but did not think they were in bad condition, and that she found nothing wrong about the eaves. She did not state that she ever examined them or that she had any actual knowledge of their condition, and it is evident that she was not there at the time the eaves fell, because she says nothing about it.

The testimony of the witness Rebollo (pages 72, 73) was to the effect that he was a mechanic by trade, and was also living in the house at the time of the accident; that prior to that time he had never noticed anything wrong with the eaves, but that he had never paid any attention to their condition. As in the case of the woman Lopez, there was nothing in these statements to show that Rebollo had any knowledge that would warrant him in stating the condition of the projecting roof or eaves, or even to express any opinion regarding them. It is plain that none of the few statements of these witnesses were material, and the ruling of the court thereon could not have prejudiced the plaintiff in error.

Gregg *vs.* Moss, 81 U. S., L. R., 20, 740:

"We have a learned argument on the vexed question of the admissibility of the declarations of one partner or joint obligor, against the other. But we are of opinion that the ruling of the court presents no error which should reverse the judgment, because its rejection worked no harm to the plaintiff. The execution of the paper was not denied, nor was it controverted, except by the general form of pleading, that Kellogg had received the money. It had already been proved by several other witnesses and was at no time made a point in the case. The whole controversy before the jury turned on the question whether the money so received was advanced by Gregg on the credit of Kellogg and Moss alone, and if so, whether he had afterwards agreed to convert it into capital. The admission of Kellogg that he had received the money from Gregg gave no light on either of these questions. The judgment should not be reversed for the rejection of this testimony whether it was in strict legal principle admissible or not."

Lancaster *vs.* Collins, 115 U. S., 29, 373:

"No judgment should be reversed in a court of error when it is clear that the error could not have prejudiced, and did not prejudice, the rights of the party against whom the ruling was made. Deery *vs.* Cray,

5 Wall., 795, 803 (72 U. S., bk. 18, L. Ed., 653, 655); Gregg *vs.* Moss, 14, *Id.*, 564, 569 (81 U. S., bk. 20, L. Ed., 740-742); Lucas *vs.* Brooks, 18 *Id.*, 436, 454 (85 U. S., bk. 21, L. Ed., 779, 782); Allis *vs.* Ins. Co., 97 U. S., 144, 145 (bk. 24, L. Ed., 1008); Cannon *vs.* Pratt, 99, *Id.*, 619, 623 (bk. 25, L. Ed., 446, 448); Mining Co. *vs.* Taylor, 100, *Id.*, 389, 394 (bk. 28, L. Ed., 468, 470)."

H.

That the Court erred in reducing the issue presented to the jury to the question of whether or not the accident was due to an act of God.

This point is not presented or saved by the bill of exceptions and is not in any way raised in the record or bill of exceptions, and the record shows that it is the only affirmative defense of plaintiff in error set out in his answer to complaint.

The court has repeatedly held that unless such questions are properly raised and exception saved this court will not consider same.

Cornell *vs.* Green, 163 U. S., 80; L. R., 41, 76:

> An assignment of errors cannot be availed of to import question into a cause which the record does not show were raised in the court below and rulings asked thereon, so as to give jurisdiction to this court under the 5th section of the act of March 3, 1891. Ansbro *vs.* United States, 159 U. S., 695, 697, 698 (40:310, 311).

I.

That the Court erred in entering judgment.

This assignment of error is without merit and is not presented or saved in court below, and it is too general in its terms to be reviewed by this court.

Scholey *vs.* Rew, 23 Wallace, 331; Law Ed., vol. 23, p. 100.

Tex. & Pac. Ry. *vs.* Archibald, 170 U. S., 670; Law Ed., vol. 42, p. 1191.

The other points raised in brief of plaintiff in error are not discussed, as same are not saved in bill of exceptions, assignment of error, or in any other proper way.

Therefore the court below will see that the only assignments of error raised in court below is the latter part D, E, F, G, and that the court will not in any manner consider the other alleged errors assigned, and an examination of the record shows the assignments of error properly saved are without merit.

There being no error in the proceedings in the court below, I respectfully ask that the judgment be affirmed.

Respectfully submitted,

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